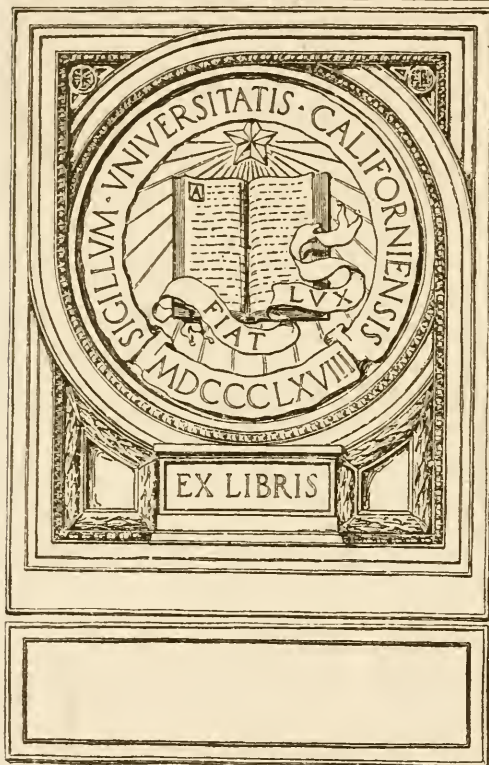




EXCHANGE





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No.....

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

Ex parte Equitable Trust Company of
New York, Original No. 169.

In the Matter of the Petition of The
Equitable Trust Company of New York,
as Trustee, for a Writ of Mandamus,
Original No. 2757.

In the Matter of the Appeal of The
Equitable Trust Company from the
Order Issuing the Injunction, dated
February 21, 1915. }

Brief of Petitioners and Appellants.

MURRAY, PRENTICE & HOWLAND,
JARED HOW,
W. E. S. GRISWOLD,
Attorneys for Equitable Trust Company
of New York.

E. W. M. CUTCHEON,
JOHN F. BOWIE,
Amici Curiae.

Filed this.....day of March, 1916.

F. D. MONCKTON, Clerk.

By....., Deputy.

1 M. C.
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BRIEF OF PETITIONERS AND APPELLANTS.

SUMMARY OF QUESTIONS OF LAW.

The primary questions of law involved in these proceedings are:

(1) Can a court whose jurisdiction has been invoked for the purpose of obtaining a decree fore-

closing a mortgage, both principal and interest of the debt being due, refuse to proceed with the foreclosure suit, though all parties request a decree, until the liability of a guarantor who has undertaken to pay interest is determined?

(2) Can this Court, acting on its own motion, against the wishes of all parties, direct that the guarantor be made a party to the foreclosure proceeding, and require that the liability of the guarantor be therein ascertained prior to making a decree of foreclosure?

(3) Assuming that a chose in action forms part of the assets pledged to secure a mortgage (and this is our opponent's claim, and is not the fact), can the court whose jurisdiction is invoked solely for the purpose of foreclosure, refuse to sell the property mortgaged and pledged until its receiver has by judicial proceeding attempted to realize upon the choses in action?

STATEMENT OF FACTS.

Under date of June 23, 1905, the Denver and Rio Grande Railroad Company and the Rio Grande Western Railroad Company (since consolidated as the Denver & Rio Grande Railroad Company of Colorado and Utah, and hereafter referred to as the Denver Company), as parties of the first part; the Western Pacific Railway, as party of the second part, and the Bowling Green Trust Company, as trustee of

the First Mortgage of the Western Pacific Railway, as party of the third part, entered into two contracts, referred to for convenience as Contracts "A" and "B".

CONTRACT "A".

This Contract recites:

(a) The virtual ownership of the Western Pacific Railway by the Denver Company.

(b) The desire of the Denver Company to afford credit essential to enable the Western Pacific Company to sell its First Mortgage Bonds, and construct its road.

To accomplish this end the Denver Company covenants to purchase at 75 Second Mortgage Bonds of the Western Pacific to the principal amount of \$25,000,000, if the proceeds of such sale be necessary to provide funds for the construction of the Western Pacific Railway.

This Contract has been fully performed.

CONTRACT "B".

This Contract contains substantially the same recitals as Contract "A", but the covenants were as follows:

(a) That the respective Railroads should be operated as a joint transportation system, each giving to and handling for the other all business within its power.

(b) A covenant by the Denver Company to lease equipment to the Western Pacific Company.

(c) The grant of a right to the Denver Company by which a through passenger train could be operated between Denver and San Francisco.

These provisions are termed for convenience the traffic features of Contract "B". The financial features were as follows:

(a) A covenant by the Denver Company to pay semi-annually to the trustee of the First Mortgage of the Western Pacific Company prior to the maturity of the interest coupons *a sum which, added to the moneys then in the hands of the Fiscal Agents of the Pacific Company, should equal the amount necessary to pay the coupons maturing.*

(b) A covenant by the Denver Company to pay to the trustee, prior to the maturity of each sinking fund payment to be made, *a sum which, when added to the sinking fund payments actually made by the Pacific Company, should equal the amount required by the mortgage.*

In addition to the contract of suretyship above set forth, the Contract provided for the convenient accomplishment of the same object by obligating the Denver Company to *loan* to the *Western Pacific*

Company on its unsecured promissory notes moneys sufficient, together with the earnings of that road, to pay taxes, maintenance and interest and sinking fund requirements under the First Mortgage.

The traffic rights assured to the Denver Company by the traffic features above mentioned were among the inducements which led that Company to undertake the enterprise. But as every right accorded to the Denver Company under these provisions could easily have been obtained through its stock control of the Pacific Company or by subsequent contract, it is obvious that the reason for including these provisions in the contract was that of assuring the Pacific Company bondholders an outlet for that road east of Salt Lake City. Such an outlet might be of the utmost importance to the Pacific Company. Accordingly, it was provided for in this contract. *But inasmuch as the provisions for interchange might become undesirable, Contract "B" provided that in the event of default by the Pacific Company in the payment of principal or interest, or the performance of any of the covenants of the deed of trust securing the First Mortgage Bonds, every provision of Contract "B", except the provision whereby the Denver Company assumed the obligations of suretyship so far as concerned the payment of interest and the making of sinking fund payments to the Trustee, could and should*

be terminated by the Trustee on request of the holders of two-thirds in amount of the bonds.

Sec. 14, Art. VI, Contract "B."

ESSENTIAL PROVISIONS OF CONTRACT B.

(1)
provision giving
single bondholder
right to enforce
contract.

The Trustee covenants and agrees that it will, from time to time, upon the request of any holder or holders of bonds secured by said First Mortgage of the Pacific Company and being satisfactorily indemnified against the expense of so doing, acting either alone or with the Pacific Company, take steps to enforce by a suit or suits in equity or at law or by other proper proceedings to be prosecuted or taken in its own name or in the name of the Pacific Company, or in the name of both, all the terms and provisions of Article II hereof that require any payments to be made to the Trustee by the parties of the first part or either of them, and, upon the request of the holder or holders of twenty per cent (20%), in amount of said bonds at the time being outstanding, will likewise enforce any and all other provisions of this agreement, and likewise of all modified agreements, if any, substituted therefor, as provided in Section 14 of Article VI hereof.

Art. V.

Obligation of
the Denver Co.
to pay to
Trustee.

The amount of moneys to be paid to the Trustee by the parties of the first part, and to be applicable to the payment of such interest, as provided in Section 4 of Article II hereof, shall be equal to the difference between the amount so required, less the amount so held by the Trustee, and such sum as shall at the date of such notice actually have been paid by the Pacific Company to its fiscal agent or

fiscal agents for the purpose of making such payment of interest;

Sec. 7, Art. VI.

4. (a) The Denver Company and the Western Company, parties of the first part aforesaid, jointly and severally covenant and agree to purchase semi-annually, beginning with the date hereof except as otherwise expressly stated, and to pay therefor, dollar for dollar in cash, at the dates and in the manner hereinafter provided, promissory notes of the Pacific Company, bearing interest at the rate of five per cent. (5%) per annum and payable upon demand, to the amount face value, by which the gross earnings and income of the Pacific Company during the preceding fiscal half year shall be insufficient to meet the sum of the following:

Obligation of
Denver to loan
to W. P. Co.

(1) Its operating expense, including rentals payable under leases and, particularly, any lease of terminals at Salt Lake City, also current payments upon claims for damages to persons or property, and its ordinary, including all necessary, expenses of maintenance;

(2) Its taxes, including all assessments and other governmental charges against it or that may become a lien upon any of its property;

(3) From and after the first day of September, 1908, or the earlier acquisition and completion of the Pacific Company's main line of railroad from San Francisco to Salt Lake City, all interest falling due during the then current calendar half year upon the Pacific Company's Fifty million dollars (\$50,000,000), face value, of First Mortgage Five Per Cent. Thirty-Year Gold Bonds;

(4) The Pacific Company's annual contribution to the sinking fund provided for in its said First Mortgage, if the same be payable during the then current calendar half year;

(5) Any other charge or expense that it may be necessary that the Pacific Company shall pay, in order to assure the continued and efficient operation of its property and to protect unimpaired the lien and priority of its said First Mortgage;

(6) Any tax or taxes which the Pacific Company may be required by law or permitted to pay upon or deduct from the principal or interest of its said First Mortgage bonds, so that the holders of such bonds shall, under all circumstances, receive the principal and interest thereof without deduction for any tax or taxes;

(7) All interest for such current calendar half year upon all indebtedness of the Pacific Company, other than its said First Mortgage bonds.

Sec. 4, Art. II.

Neither the Pacific Company nor any one claiming under it, save only such persons or corporations as may be entitled to receive the interest upon said First Mortgage Bonds, shall be entitled to or possess any interest in, lien upon or claim to said fund, or any part thereof.

Sub A, Sec. 4, Art. II.

1. So far as the same lawfully may be done, the parties of the first part and each of them will give and turn over or cause to be given and turned over to the Pacific Company all such west-bound traffic of every description controlled by them, or either of them, whether originating on or passing over any of their lines, or any of the lines of either of them, or otherwise so controlled, as shall be destined to any point or points upon or that can be reached with reasonable convenience

Provision de-
vying W. P.
any right of
possession of
money paid
Trustee.

Traffic
provision.

by or via any line or lines of the Pacific Company, or any part or branch thereof, whether alone or in conjunction with other lines of railway; and will cause all east-bound traffic of every description, which shall originate in territory in any way tributary to, or which with reasonable convenience may be forwarded over, any line of the Pacific Company and destined to any point or points upon, or that can be reached by or via any line or lines of the Pacific Company, whether alone or in conjunction with other lines of railway, and which is within their control, or the control of either of them, to be delivered to the Pacific Company, for transportation to as great an extent as any of its lines are available for that purpose, and that so far as practicable their lines of railway and the lines of railway of each of them shall be operated with the lines of railway of the Pacific Company as a joint transportation system for all transportation purposes.

Each of the parties of the first part will receive and promptly transport to its destination or over its line and deliver to the connecting carrier all east-bound freight routed over its line and tendered to the Western Company by the Pacific Company.

Sec. 1, Art. II.

Section 10 of Article VI provides:

"The refusal, neglect or other failure of the Pacific Company to perform any or all of the covenants, agreements or conditions herein contained by it to be performed shall not constitute ground for the rescission of or refusal to perform or delay in performing this contract by the parties of the first part, or either of them; but in event of any such refusal, neglect or other failure, the party or parties

Severable
character of
covenants.

of the first part aggrieved thereby may have resort to such remedy by suit for specific performance or action for damages as may be appropriate."

Section 13 of Article VI provides:

"This agreement shall, except as hereinafter provided, continue in full force and effect, and be binding upon all the parties hereto, from the date hereof until all of said \$50,000,000, face value, of First Mortgage Five Per Cent. Thirty Year Gold Bonds of the Pacific Company shall be fully paid, principal and interest, or until said bonds shall be called for redemption and provision made for payment thereof in full, principal and interest, as provided in the First Mortgage of the Pacific Company, and shall run with the railways of the said several Railway Companies, parties hereto, into whosoever hands the same may come."

Section 14 of Article VI provides:

"Notwithstanding anything herein contained or anything contained in said First Mortgage of the Pacific Company, neither the obligation of the parties of the first part nor the obligation of either of them to make any of the payments provided for in paragraphs 4 and 5 of Article II of this agreement, as and at the times herein provided, shall be abrogated or in any manner modified until all of the bonds secured by the Pacific Company's First Mortgage shall be fully paid, principal and interest, or until said bonds shall be called for redemption and provision made for payment thereof in full, principal and interest, as provided for in the First Mortgage of the Pacific Company."

Life of obligation and provision declaring the same shall run with land.

Covenant to survive foreclosure.

"In case the Pacific Company, or any of its successors or assigns, shall make default in the payment of the principal of or interest agreed to be paid upon its bonds to be issued under its said First Mortgage, according to the tenor and effect of said bonds and the interest coupons pertaining thereto, or in event of any default in the covenants or conditions of said First Mortgage whereby a right of foreclosure shall thereunder accrue to the Trustee or the holders of the bonds secured thereby, *the Trustee shall have and shall forthwith become vested with the right, upon the written request of the holders of two-thirds in amount of the bonds outstanding and secured by said mortgage executed and authenticated in the manner aforesaid, to, and upon any such request, the Trustee SHALL TERMINATE this agreement (save and excepting always the provisions for payments of interest, sinking fund contributions and taxes contained in paragraphs 4 and 5 of Article II hereof).*"

Right of bondholder on default to terminate all provisions except those requiring payment of interest and sinking fund to Trustee.

Section 14 continues:

"but such termination of this agreement shall not be deemed to and shall not release, nor shall anything else done hereunder release, the rights of the Trustee or of the holders of the First Mortgage Bonds of the Pacific Company to the benefits of the agreements of the Railway Companies, parties of the first part, to make the payments provided for in paragraphs 4 and 5 of Article II hereof, or upon or against any fund derived or constituted as provided in any of said paragraphs. Nothing herein contained shall be taken to authorize or to result in the termination of this agreement in any event or contingency (prior to the payment or provision for payment of all of said First Mortgage Bonds, principal and interest, as aforesaid), except upon

Provision continuing obligation to pay interest and sinking fund to Trustee after termination of other provisions.

the election of the Trustee made with the written approval of the holders of two-thirds in amount of the outstanding bonds secured by the Pacific Company's First Mortgage given and evidenced in manner and form as above provided; but, on the contrary, at all times prior to such termination thereof, whether before or after default as aforesaid, the Trustee as well as the Pacific Company, its successors and assigns, shall be entitled to specific performance of the same and of any agreement substituted therefor and to enforce the same by suits in equity or actions at law or otherwise, as may be appropriate."

The rights of the Western Pacific Company, *not those of the trustee*, were pledged under the First Mortgage of the Western Pacific Company, and this Mortgage, executed on the same day as Contracts "A" and "B," was drawn in contemplation of the execution of these agreements, and provided that the obligations of the Denver Company as surety should not be sold on foreclosure, but should survive to the Trustee. Thus the Mortgage provided for a sale of the property of the mortgagor *excepting*

"the right of the Trustee and of the holders of the bonds secured hereby under said agreement between The Denver and Rio Grande Railroad Company, The Rio Grande Western Railway Company, Western Pacific Railway Company and Bowling Green Trust Company, to require said two first named companies and each of them to make any payment or payments of money to the Trustee, and to recover damages from said companies or either of them in default of any such payment or payments, which said rights and all rights secured by

Right to require payment of interest in spite of default and sale survives to Trustee.

said agreement necessary for the enjoyment and enforcement of such rights shall remain in and survive to the Trustee for the benefit of the holders of the bonds secured hereby, after and despite any and every sale made by virtue of this indenture, whether under the power of sale hereby granted and conferred or pursuant to judicial proceedings."

Sec. 3, Art. V, First Mortgage.

The Mortgage further provided:

"The Trustee shall hold all moneys received by it pursuant to the provisions of said agreement between the Denver and Rio Grande Railroad Company, The Rio Grande Western Railway Company, Western Pacific Railway Company and Bowling Green Trust Company, prior to any sale of the mortgaged and pledged premises and property, whether made under the power of sale hereby granted or pursuant to judicial proceedings, in trust for, and will apply the same and cause the same to be applied, at the times and in the manner therein provided, to the uses and purposes therein prescribed with respect of such moneys; provided, however, that any moneys paid to the Trustee under the provisions of said agreement and prior to any such sale, for the benefit of the sinking fund provided for in this mortgage, shall be held, invested and disposed of in accordance with the provisions concerning the establishment, investment and disposition of the sinking fund contained in Article VIII hereof. After any sale or sales, whether under the power of sale hereby granted or pursuant to judicial proceedings, any and all moneys that may be received by the Trustee under the provisions of said agreement between The Denver and Rio Grande Railroad Company, The

Provision for payment of moneys collected on Contract B after default or sale.

Rio Grande Western Railway Company, Western Pacific Railway Company and Bowling Green Trust Company, intended to provide the Trustee with moneys wherewith to pay interest upon the bonds secured hereby, shall forthwith be applied by the Trustee to the payment pro rata of the interest upon such of the bonds secured hereby as shall then remain unpaid in whole or in part whether or not the same shall have been reduced to judgment; and any and all moneys that may be received by the Trustee, after any such sale or sales, under the provisions of said agreement intended to provide the Trustee with moneys wherewith to make payments into the sinking fund hereby established shall forthwith be applied by the Trustee to the payment pro rata of the amounts remaining due for principal and interest upon the bonds secured hereby and then unpaid in whole or in part. The amount so payable shall in each case be paid only upon presentation of the bond or bonds and coupons (in the case of coupon bonds) whereon the same is to be paid and the amount of such payment shall be endorsed thereon."

Sec. 9, Art. IV (pp. 62-1), First Mortgage.

Section 11, Art. V, of the Deed of Trust, provides:

"In case of sale of the mortgaged and pledged premises and property or any part thereof, the purchaser in settlement or payment for the property purchased shall be entitled to use and apply towards payment of the purchase price of the property purchased any bonds and any matured and unpaid interest and coupons hereby secured, by presenting such bonds and coupons (in the case of coupon bonds) so that there may be credited and endorsed or stamped as paid thereon the sums

Provision keeping alive bonds after sale for preservation of rights on Contract B.

applicable to such payment out of the net proceeds of such sale as provided in Section 10 of this article; and such purchaser shall thereupon be credited on account of the purchase price payable by him with the sums so applicable and credited on the bonds and coupons so presented. *Such bonds and coupons so presented by the purchaser shall be deemed to be paid only to the extent of the amounts so credited as paid thereon.*"

The Mortgage also contained an unusually strong clause giving to a majority of the bondholders the right to control the Trustee in the exercise of the powers conferred upon it. The majority was also accorded the right to require the Trustee to declare due the principal debt in the event that an interest default continued for the period of six months.

Section 12 of Art. V of the Mortgage provided:

"anything in this indenture contained to the contrary notwithstanding, the holders of a majority in amount of the bonds hereby secured and outstanding shall have the right from time to time, if they so elect and manifest such election by an instrument in writing executed and delivered to the Trustee, to direct and control the method of conducting any and all proceedings for any sale of the premises and property hereby conveyed, mortgaged and pledged, or for the foreclosure of this indenture or for the appointment of a receiver or for any other action or proceeding hereunder, and for such purpose to instruct the Trustee to exercise its right of election to declare said bonds due or to waive the exercise of the same, or if exercised, to annul the same, or to institute, continue or discontinue any proceedings hereunder."

Provision for
majority
control.

Direct guaranty
endorsed on
some bonds.

In addition to these provisions, and pursuant to an agreement with the underwriters, and in order to obtain a more ready market for the Western Pacific bonds, the Denver Company endorsed on any bond, when such endorsement was requested, a direct guaranty for the payment of interest. This guaranty was endorsed on bonds in the principal amount of \$36,812,000.

SUMMARY OF CONTRACTS.

As a result of these various contracts, the bondholders of the Western Pacific Company could, in event of default, adopt various courses.

If the default occurred in the payment of interest, they could:

(1) Sue the Denver Company without proceedings to foreclose, suit being based upon Contract "B."

(2) Sue to foreclose for interest without suing the Denver.

(3) They could, if they desired, adopt both courses.

If interest remained unpaid for a period of six months, they could:

(1) Declare the principal due and sue to foreclose for both principal and interest.

(2) After such foreclosure, they could prosecute an action against the Denver Company on the con-

tract of suretyship, insofar as the principal debt remained unpaid after application of the proceeds of the sale.

We desire also to emphasize at this point that there is vested in the bondholders the right to have the property of the Western Pacific sold, *and that part of this property is the traffic feature of Contract "B," assuring, as it does, an outlet to the east from Salt Lake City.*

On the other hand, it is equally the right of the bondholders, if the holders of two-thirds in principal amount see fit to sanction that course, to terminate the traffic features of Contract "B" and sell the road free and clear of all traffic rights and obligations. *These rights are a part, and a very essential part, of the security. These rights so created are not dependent on the action of the Court but arise from the instruments themselves and form inherent limitations on the subject-matter over which the jurisdiction of the Court is exercised.*

On March 1, 1915, the Western Pacific Company defaulted in payment of interest, and the Denver Company failed to perform the obligations it assumed under Contract "B." The Trustee promptly brought suit to foreclose for non-payment of interest. In this suit it prayed:

"That a receiver may be appointed to take possession of and to operate the properties of defendant which are subject to the lien of such First Mortgage, and to collect and receive the tolls, earn-

ings, revenue, rents, issues, profits and other income thereof, and to apply the net income thereof to the benefit of the holders of bonds secured by such First Mortgage as provided by the terms thereof, and with such other powers and authority and limitations of power and authority as to this Honorable Court shall seem proper."

A few days thereafter an order was made appointing receivers, the terms of the order being:

"on motion of the plaintiff by Jared How, its solicitor, the defendant not objecting thereto, it is

Ordered, Adjudged and Decreed, that Warren Olney, Junior, of Berkeley, California, and Frank G. Drum, of San Francisco, California, be and they are hereby appointed joint receivers of all and singular the property of the defendant, Western Pacific Railway Company, including the railway line now being operated by said Company, and all other property, real, personal, and mixed, of whatsoever kind and description, and wherever situated, whether described in the bill of complaint or not, including all equipment, cars, and other rolling stock, machinery, tools, materials, shops, coal yards, fixtures, coal on hand and supplies now owned, held or in the possession and use of said corporation, and wherever situated and including all tracks, terminal facilities, real estate, warehouses, offices, stations, and all other buildings of every kind, owned, held, or possessed by said Company, together with all telegraph lines and the appurtenances thereto, and also all moneys, books of account, contracts of every kind, debts, things in action, bonds, stocks, securities, deeds, leases, leasehold interests, beneficial muniments of title, bills receivable, rents, and income of premises accruing

and to accrue, as well as all franchises, easements, rights and privileges of said Western Pacific Railway Company."

The Receivers were given the usual powers.

FACTS SHOWN BY THE AFFIDAVIT OF MR. CUTCHEON.

Upon May 1, 1915, the bondholders formed a Protective Committee, and June, 1915, there had been deposited under the agreement bonds in the principal amount of over \$25,000,000. And with this Committee there was then, and now is, co-operating a Dutch Committee, holding \$2,500,000 of bonds. The condition of the Denver Company at this time was as follows:

At the time the Denver Company undertook the construction of the Western Pacific, that road had an outstanding debt, secured by mortgage, amounting to over \$80,000,000. It had since that date been called upon to purchase Second Mortgage bonds of the Western Pacific, and had paid therefor \$18,750,000. It had also been called upon to perform the obligations assumed by Contract "B," and in one way and another, in responding to the obligations assumed by Contracts "A" and "B," had paid out to or on account of the Western Pacific Company about \$16,408,000 in addition to the purchase price of the Second Mortgage bonds. As a result of this, and of its own necessities, its mortgage debt had increased to \$43,000,000. These bonds being secured by two dif-

ferent mortgages, one the Refunding Mortgage which secured outstanding bonds in the principal amount of \$33,000,000; the other the Adjustment Mortgage which secured bonds in the principal amount of \$10,000,000.

Both of these Mortgages were made after the Western Pacific enterprise had been undertaken, and the Adjustment Mortgage contained a clause by which a default in the performance by the Western Pacific of its obligations under its Mortgage was a default authorizing the foreclosure of the Adjustment Mortgage itself.

In any action prosecuted to judgment by the Trustee for the Western Pacific bondholders against the Denver Company there will be presented for decision the question whether the financial provisions of Contract "B" are an equitable charge on the assets of the Denver Company superior to the lien of the adjustment and refunding bonds.

Prior to the institution of the suit to foreclose the First Mortgage of the Western Pacific Company, the financial situation of the surety of the Western Pacific was by no means all that could be desired, for the Denver was burdened with a secured debt in the principal amount of \$123,000,000, and of this sum the last \$10,000,000 was in default and subject to foreclosure, at the election of the bondholders. The Denver was also in need of money for betterments and capital expenditures, \$25,000,000 being the amount required as estimated by competent engineers.

The net earnings of the Denver had, however, always exceeded its fixed charges, and in the year ending June 30, 1914, that road earned \$1,055,000 in excess of bond interest and sinking funds. This was one of the worst years in the history of the Denver Company. In that same year the earnings of the Western Pacific Company amounted only to \$321,506. So the earnings of both companies were hardly sufficient to meet one-half the interest accruing on the First Mortgage bonds of the Western Pacific Company.

At this time certain bondholders of the Western Pacific, holding bonds of the Western Pacific with the interest guaranty of the Denver Company endorsed thereon, commenced suit against the Denver Company. It was obvious that if any substantial number of these suits were commenced and pressed, the Denver would be forced to the wall, and the creditors obtaining the earliest judgments might make a slight profit, to the great cost and irreparable detriment of other bondholders.

Under these conditions the Bondholders' Committee requested the Trustee to commence an action upon Contract "B," and obtain an order enjoining the prosecution of separate suits, the object being to control the actions against the Denver, and not to permit them to be forced, to the injury of all.

See affidavit of Cutcheon, Exhibit No. 21, Application for Writ of Prohibition.

It was then contended and has since been held that in a transitory action jurisdiction in the Northern District of California could not be obtained over the Denver Company. (See *Fry v. Denver Co.*, 226 Fed., 893), and a foreclosure bill ancillary to that pending in this District had been commenced in New York, and the same receivers appointed. As various citizens of New York were about to sue the Denver, the suit on Contract "B" was commenced as a dependent suit in New York, the bill being filed as a dependent bill in order to obviate objections to jurisdiction based on the fact that parties on both sides were residents of the same State.

When the fact that the dependent bill had been filed in New York came to the attention of the Court, it issued an order restraining the prosecution of that suit, even to the extent of enjoining the plaintiff from procuring an injunction against individual bondholders suing the Denver Company and requiring the plaintiff to show cause why it should not dismiss that suit or be enjoined from further proceedings in it. This it did upon its own motion. A hearing was had upon the order to show cause, and the question submitted, the restraining order being kept in force.

In December, 1915, over \$37,000,000 of bonds having been deposited with the Protective Committee, the holders elected to declare due the principal of their debt secured by the First Mortgage. The earnings of the Western Pacific Company for the year 1915

had amounted to but \$617,258.44. And in November 1915, the Central Trust Company of New York, as Trustee of the Second Mortgage, had filed a cross-bill in the action for the foreclosure of that Mortgage, which was then in default, there then being approximately \$8,200,000 interest accumulated and unpaid thereon.

Accordingly, a supplemental and amended bill was filed, seeking foreclosure and sale for payment of principal and interest.

In December, 1915, over two-thirds of the bonds being deposited with the Protective Committee, a plan of reorganization was formulated. This plan provided for the acquisition of the property by the depositing bondholders on a prompt foreclosure sale; transfer of the property to a California corporation for the purpose of operation; and a transfer of the stock of this corporation to a holding company, the stock of which should be distributed to bondholders. Provision was made for the issuance and sale at 90 of bonds of the operating company, with a certain percentage of stock in the holding company. The present bondholders were accorded the first right to purchase bonds, those not taken by the bondholders being underwritten, the amount payable for underwriting being $2\frac{1}{2}\%$, or \$500,000. By the Plan the rights of the depositing bondholders against the Denver Company arising under Contract "B" were transferred to the holding company, and provision made for the protection of

these rights against loss through foreclosure of the Adjustment Mortgage. Obviously no provision was made with regard to the rights of non-depositing bondholders against the Denver Company; and obviously none could be made. Any assertions that the plan affected the rights of any non-depositing bondholder against the Denver Company is made either maliciously or without understanding. And any claim that through failure to make the Trustees under the Denver mortgages parties to the suit in New York against the Denver Company is a surrender of any claim of priority over those mortgages for any lien in favor of the Western Pacific bondholders against the property of the Denver Company is absurd.

Under this plan bonds aggregating the principal amount of \$43,900,000 have been deposited, and co-operating with this Reorganization Committee is a Dutch Committee, holding bonds in the principal amount of \$2,500,000.

The underwriting procured pursuant to the Plan expires July 1, 1916, at which date the Syndicate expires, and as a result securities must be ready for delivery before that date if the benefits of that underwriting are to be availed of.

All parties were anxious and willing to have a decree of foreclosure made at the earliest possible date, and were proceeding to that end, when, on February 21, 1916, the Court made an order directing that the Denver & Rio Grande and Missouri Pacific Railway

be made parties to the action. This order was made by the Court on its own motion, and was as follows:

"Let an order be entered that the said plaintiff, The Equitable Trust Company of New York, be enjoined and restrained from further proceeding with said ancillary and dependent suit in Equity, numbered E 12-287, in the United States District Court for the Southern District of New York and be enjoined and restrained from bringing any further action or proceeding involving said Contract "B" in any jurisdiction other than this Court, and from taking any other steps which may, in anywise impair or affect the obligations of said contract or any of its provisions, without first procuring the sanction of this Court; and further,

That the Denver and Rio Grande Railroad Company be made a party to this action and that such proceedings may be taken as may be necessary to make the said the Denver & Rio Grande Railroad Company a party to this action, and compel it to interplead herein and to set up any and all rights it may have or claim against the defendant herein, under the mortgage or deed of trust in this action or any of the contracts pledged therein, or otherwise; and,

That the Missouri Pacific Railway Company be made a party to this action and that such proceedings may be had and taken as may be necessary to make the said Missouri Pacific Railway Company a party to this action and to compel it to inter-plead herein and set up any rights it may have herein;"

At the same time the Court made an order enjoining the prosecution of the suit on Contract "B" initiated in New York.

On March 6, 1916, the first day in the General

Term beginning on that day on which a motion to set equity causes could be heard, there was presented to the Court stipulations of all parties to the suit consenting to the setting of the cause forthwith, and stipulations consenting to the entry forthwith, or at the earliest possible date, of a decree of foreclosure. Affidavits showing the urgent necessity of immediate action were read. The Court refused either to set the case or give the decree, but continued the matter one week to allow the Receivers to make a showing in opposition. The following colloquy took place between Court and counsel:

THE COURT—The Court cannot say what its attitude would be. The order was made directing that a proper proceeding be had to bring them before this Court. Of course, they are not foreclosed from coming here and objecting to the jurisdiction of the Court. That has to be determined, too. The Court may find it has not jurisdiction; I do not think it will, but still it might. The judgment that I have formed is not infallible. If it has jurisdiction, Mr. How, I think the Court has intimated sufficiently throughout the long argument that was had, and the discussion of that order to show cause, and what it says in its opinion as well, that in its view there can be no competent marshaling or fixing of the value of this property for the purposes of sale, for the essential purpose of fixing an up-set price, without construing the extent and character of the guarantee given in that contract by the Denver & Rio Grande, because if that contract carries a right of protection to the extent that is contended on one side that it does, it might

never be necessary to sell the property of the Western Pacific. . . .

MR. PARTRIDGE—I was going to say further, your Honor, that the reason, and the only reason, why the Receivers want to be heard, or to object to the application of Mr. How here to-day, is this: That they believe that this guarantee of The Denver & Rio Grande Railroad is a mortgage upon its property, that that mortgage is prior and superior to its first and refunding Fives, and to its adjustment Sevens, and that that can be established thoroughly in this Court; in other words, that it can be established in this Court with the proper parties before it, that that lien is superior to the lien of those two interests in the amount of \$43,000,000. Furthermore, if that can be established in this Court by the Receivers, or the Equitable Trust Company, that that, together with the earnings of the Western Pacific, will more than be sufficient to pay the full interest on the bonds of the Western Pacific, \$50,000,000 par, and the sinking fund besides. * * * *

THE COURT—Of course, Mr. How, it cannot be decided until it is submitted, and as I suggested, I doubt if you will get any ruling upon this application until the Circuit Court of Appeals has advised this Court as to whether or not it is correct in the attitude it has taken.

MR. HOW—I think I ought to object again and protest against the Court's granting any continuance at the request of counsel or for the convenience of counsel for the Receivers.

THE COURT—The Court is doing it for its own protection and on its own motion and for its own enlightenment. It is bound to have enlightenment to enable it to see where the requested step is leading the Court insofar as the protection of the parties whose rights are involved here are con-

cerned. You will always find me ready to decide when I have the proper basis for it, but I cannot be coerced into deciding things that do not jump with my own judgment simply because of the magnitude of the interests behind them. Let the matter go over then until next Monday and I will give you until then to make such response to this application as you may be advised, and for the advice and aid of the Court, and such further showing as may be deemed necessary.

MR. HOW—I should like to take an exception to that ruling of the Court and to the failure of the Court to act promptly in the matter.

THE COURT—Yes.

There are thus presented on the proceedings before this Court three questions:

1. Had the lower Court power of its own motion to order:

That the Denver and Rio Grande Railroad Company be made a party to this action and that such proceedings may be taken as may be necessary to make the said the Denver & Rio Grande Railroad Company a party to this action, and compel it to interplead herein and to set up any and all rights it may have or claim against the defendant herein, under the mortgage or deed of trust in this action or any of the contracts pledged therein, or otherwise; and

That the Missouri Pacific Railway Company be made a party to this action and that such proceedings may be had and taken as may be necessary to make the said Missouri Pacific Railway Company a party to this action and to compel it to interplead herein and set up any rights it may have herein?

This question arises on the proceedings for prohibition.

2. Did the Court err in restraining proceedings before the United States District Court, for the Southern District of New York? This question arises on the appeal.

3. Was the action of the Court in refusing to enter a decree in accordance with the stipulations of the parties, or in the alternative, refusing to set the cause for early hearing, a refusal to exercise a jurisdiction which the parties might lawfully call upon it to exercise, or at least a plain abuse of discretion?

PART I.

THE ORDER DIRECTING THAT THE DENVER COMPANY AND THE MISSOURI PACIFIC COMPANY BE MADE PARTIES IS VOID, AND A WRIT OF PROHIBITION SHOULD ISSUE AS PRAYED.

(1) If the Order of the Court be void, Prohibition is the proper remedy.

There can be no doubt that prohibition is the proper remedy in this case, for, as said by the Supreme Court of the United States in *In Re Rice*, 155 U. S., 396:

“Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a

matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence, and the want of jurisdiction does not appear upon the face of the proceedings. *Smith v. Whitney*, 116 U. S., 173; *In Re Cooper*, 143 U. S., 472, 495."

In *In re Dennett*, 215 Fed., 673, this Court has held that a lack of remedy by appeal which will justify the writ of mandamus means the lack of a remedy equal to that which may be afforded by a writ of mandamus. It is clear that an analogous rule should apply at least with equal force in the case of a writ of prohibition.

- (2) The Jurisdiction of the Court over the Controversy arising on Contract B was never invoked.

In the case of *The Equitable Trust Company of New York v. the Western Pacific*, the bill of complaint invoked the jurisdiction of the Court for the purpose of obtaining the foreclosure of the First Mortgage on the property of the Western Pacific. The appointment of the Receiver was sought and made pending foreclosure, for the purpose of preserving the property covered by the mortgage during foreclosure.

The parties to the original bill were The Equitable Trust Company and the Western Pacific—no one else. The jurisdiction of the Court was not invoked for any purpose except foreclosure, and any judgment ren-

dered against the Denver Company upon a collateral undertaking to the plaintiff would have been void upon its face.

- (3) The Court cannot require that there be submitted to it a controversy concerning which its jurisdiction has not been invoked.

In *Munday v. Vail*, 34 N. J. L., 442, the principles of law governing jurisdiction were stated as follows:

“Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in the given case. To constitute this, there are three essentials: First. The Court must have cognizance of the class of cases to which the one to be adjudged belongs. Second. The proper parties must be present. And, Third. The point decided must be, in substance and effect, within the issue. That a Court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that, because A and B are parties to a suit, that a Court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons, by becoming suitors, do not place themselves, for all purposes, under the control of the Court, and it is only over these particular interests which they choose to draw in question, that a power of judicial decision arises. If, in an ordinary foreclosure case, a man and his wife being parties, the Court of Chancery should decree a

divorce between them, it would require no argument to convince every one that such decree, so far as it attempted to affect the matrimonial relation, was void; and yet the only infirmity in such a decree would be found, upon analysis, to arise from the circumstances that the point decided was not within the substance of the pending litigation."

In *Reynolds v. Stockton*, 43 N. J. Eq., 211, the facts were as follows: Certain persons engaged in litigation concerning the ownership of a fund of money. The Court decided not only the question presented by the pleadings, but rendered a personal judgment in favor of one party against another party. The personal judgment was declared void on collateral attack, the Court saying:

"The question presented by the appeal to this Court is, whether to the decree of the New York Court the conclusive force and effect of a judgment must be accorded.

That question is distinctly presented in *Munday v. Vail*, 34 N. J. L., 418, where it is held by the Supreme Court of this State that a decree which is entirely aside of the issue raised in the record is invalid, and will be treated as a nullity, even in a collateral proceeding.

A decree or judgment which is not appropriate to any part of the matter in controversy before the Court can have no force. The matter in controversy is that exclusively which is presented by the pleadings and the issue framed thereby.

The object of the New York suit was fully accomplished, so far as the pleadings disclosed its purpose, when the New York fund was disposed of. There was an entire absence of such specific allegations in the complaint as were necessary to

put the receiver of the New Jersey company on his defense in respect to the state of the account between that company and the Hope company.

The decree in New York, having adjudicated a matter not presented by the pleadings nor within the issue, can have no higher effect than a judgment rendered in our own courts under like conditions. Under the authority of *Munday v. Vail*, *supra*, it must be treated as a nullity."

The case went to the Supreme Court of the United States. The judgment was affirmed, and the portion of the opinion of *Munday v. Vail* quoted with approval, the Court saying:

"We regard the views suggested in the quotation from the opinion as correct, and as properly indicating the limits in respect to which the conclusiveness of a judgment may be invoked in a subsequent suit *inter partes*. See, also, *Unfried v. Heberer*, 63 Indiana, 67."

Reynolds v. Stockton, 140 U. S., 254.

The suit before the District Court of the United States did not invoke the jurisdiction of that Court against either the Denver Company or the Missouri Pacific, nor did it submit to the jurisdiction of the Court any question other than the right to the foreclosure of the mortgage executed by the Western Pacific Company.

The order of the Court directing that the Denver Company be made a party to the action, requires that

there be submitted to the jurisdiction of the Court a controversy concerning which its jurisdiction has not been invoked.

- (4) The Court cannot on its own motion require that parties be brought in. If indispensable parties be wanting, the Court can dismiss the bill, but with this limitation the question of parties is a matter for the parties themselves.

If the parties directed to be brought in be indispensable to the decision of the controversy as to which the jurisdiction of the Court has been invoked, the Court can, of course, dismiss the bill unless they be made parties.

Minnesota v. Northern Securities, 184 U. S.,
199.

This is true only if as a consequence of their absence no binding decree can be rendered dealing with the subject-matter concerning which jurisdiction is invoked.

Shields v. Barrow, 17 How., 130-139.

It cannot, of course, be claimed that any person other than the mortgagee and the owner of the property mortgaged are indispensable to an action of foreclosure. Holders of subsidiary liens and mortgages are proper parties, but not indispensable, and the plaintiff has the absolute right to elect whether or not they shall be made parties to the foreclosure.

In *Searles v. Jacksonville Railroad*, 2 Woods, 621, Fed. Cas. No. 12,586, an action was commenced to foreclose a Railroad mortgage. An attempt was made to compel the plaintiff to make the holders of certain second mortgage parties. The Court said:

"Mr. Jackson moved that the Florida Central Railroad Company be made a party to the suit. This motion, being objected to by the counsel for the complainant, was denied; the circuit justice holding that a complainant cannot be compelled to add parties to his bill, if he choose to take the responsibility of their not being parties."

Drake v. Goodridge, 6 Blatch., 151; Fed. Cas. No. 4,062.

See also:

In re Printup, 6 So., 418, 419.

Lester v. Field, 24 Ill. App., 124.

In *Doke v. Williams*, 34 So., 569, the Court said:

"In the case of *Carter v. Smith*, 35 Fla., 169, 17 South, 411, this Court held that 'there is no practice in equity which will authorize the Court, upon the application of a person not a party to a suit, to compel a plaintiff to make such person a co-plaintiff'; resting its decision upon *Drake v. Goodridge*, 6 Blatchf., 151, Fed. Cas. No. 4,062.

The latter case announced the doctrine quoted, and held further that it was equally without precedent to make one a party defendant to a suit *in personam* upon his own application, following therein the prior ruling of the same Court in the case of *Coleman v. Martin*, 6 Blatchf., 119, Fed. Cas. No.

2,985. The same conclusion is reached in well considered opinions by Chancellor Cooper in *Stretch v. Stretch*, 2 Tenn., Ch. 140, and by McClellan, J., in *Ex parte Printup*, 87 Ala., 148, 6 South., 418.
* * *

“As was said by Chancellor Cooper in *Stretch v. Stretch*, *supra*, ‘To make a new defendant to a bill, claiming in a right not noticed by the bill, would throw the rules of chancery pleading into utter confusion, for it would be to try rights without any issue between the parties.’ ”

In *Shields v. Barrow*, 17 How., 145, the Court made an order directing defendants in an equity suit to file a cross-bill, bringing in new parties. The Supreme Court said:

“And it is only necessary to consider the nature of a cross-bill, to see that it cannot be made an instrument for any such end. ‘A cross-bill, *ex vi terminorum*, implies a bill brought by a defendant against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill.’ *Story’s Eq. Pl.*, §389; 3 Dan. Ch. Pr., 1742.”
* * *

“New parties cannot be introduced into a cause by a cross-bill. If the plaintiff desires to make new parties, he amends his bill, and makes them. If the interest of the defendant requires their presence, he takes the objection of non-rejoinder, and the complainant is forced to amend, or his bill is dismissed. If, at the hearing, the Court finds that an indispensable party is not on the record, it refuses to proceed. These remedies cover the whole subject.”

Even when by statute there is conferred upon the Court power to direct that parties be brought in when the parties are proper to the disposition of the issues presented by the pleading, jurisdiction over causes of action not asserted cannot be thus acquired.

In *Clay County Land Co. v. Alcox*, 92 N. W., 464, the Court's decision was as follows:

"Section 5178, Gen. St. 1894, as amended by Laws 1895, c. 29, relating to bringing in of additional parties plaintiff or defendant, construed, and held that the Court is only authorized to make its order bringing in such parties when it is necessary to do so in order to secure a full determination of the controversy between the original parties tendered by the complaint, answer, or counter-claim."

In *In re Printup*, 6 So., 418, the authorities on the subject were reviewed, the Court saying:

"In *Shields v. Barrow*, 17 How., 145, it is said: 'If the plaintiff desires to make new parties, he amends his bill and makes them. If the interest of the defendant requires their presence, he takes the objection of non-joinder, and the plaintiff is forced to amend or his bill is dismissed. If at the hearing the Court finds that an indispensable party is not on the record, it refuses to proceed. These remedies cover the whole subject' of the introduction of new parties into a pending case. In *Drake v. Goodridge*, 5 Blatchf., 151, it is said that no such practice is known in equity as making a person a defendant to a suit on his own application, or as compelling a plaintiff to join as co-plaintiff a person not a party, on the application of such person. To the same effect is the case of *Coleman v. Martin*, Id., 119. And these cases are referred to in

the case of *Stretch v. Stretch*, 2 Tenn., Ch. 140, and the principle announced in them fully indorsed. In the latter case, as in the case at bar, the subject matter of the litigation was in the hands of a receiver, who had been appointed in the suit to which the petitioners sought to be made parties. Chancellor Cooper, in delivering the opinion in that case, uses this language: 'Where there is no privity, a stranger interested in the subject matter or objects of the suit must bring forward his claim by an original bill in the nature of a supplemental bill, or in the nature of a cross-bill, as the case may be, so that those interested adversely may have process with a copy of the bill served on them, and may have an opportunity to avail themselves of the regular modes of defense to such bill;' and, even where a third person claims under or in privity with one of the parties litigant, his interest can only be brought before the Court by bill. It cannot be done by petition. *Foster v. Deacon*, 6 Madd., 59; *Carow v. Mowatt*, 1 Edw., Ch. 9. The case of *Searles v. Railroad Co.*, 2 Woods, 621, involved a relationship between the petitioning and litigant parties made like that existing in the facts of this case. That was a bill filed by the owners of the first mortgage bonds of a railroad to foreclose the mortgage and sell the road in payment of the bonds. The petitioner claimed to be the owner of second mortgage bonds of the defendant company, and as such desired to set up certain equities he had against the right of complainant to foreclose and apply the proceeds of foreclosure to the payment of the first mortgage bonds. The motion to be made a party was denied by Mr. Justice Bradley, and it was held that 'a complainant cannot be compelled to add parties to his bill if he choose to take the responsibility of their not being parties.' "

Applying these settled rules to the case at bar, it is quite evident that the order directing that the Denver and Missouri Pacific be brought in is not only erroneous, but void.

The Denver & Rio Grande Railroad Company was not an indispensable party; it was not even a proper party.

The only excuse found for bringing in the Denver is that the suretyship provisions of Contract "B" may be enforced against it. It cannot, of course, be claimed that a surety is a necessary party to an action to foreclose upon the security given for the debt. Indeed, it has been held that the surety is neither a necessary nor a proper party to such a proceeding. This precise question was presented to the Court of Appeals in the case of *Columbia Finance & Trust Co. v. Kentucky Union Railroad*, 60 Fed., 794. The facts are stated in the opinion of the Court of Appeals rendered by Judge Lurton:

"The first error assigned is in rejecting the amended answer tendered by the Columbia Finance & Trust Company on the 20th day of December, 1892, and in proceeding with the cause without requiring the Kentucky Union Land Company to be made a party thereto. It appears from this answer that the Kentucky Union Land Company guarantied the payment of the principal and interest of the first mortgage bonds, which guaranty was indorsed thereon; that this guaranty was made under authority of the charter of the Kentucky Union Railway Company. It further appears that when the coupons of this issue of bonds

became due on January 1, 1891, the land company and the railway company jointly borrowed on their notes \$60,000 from J. Kennedy Todd & Co., and with the money paid that series of coupons. The insistence of the appellant is that the Kentucky Union Land Company became by said payments entitled to a lien upon the railroad to secure the payment of this sum of \$60,000, which was used for the payment of coupons, and that it was error to proceed without bringing that company before the Court, that its lien might be established and enforced.

The unquestioned general rule as to parties in chancery is that all parties who are interested in the controversy should be made parties to the cause in order that there may be an end of litigation. If the Kentucky Union Land Company, by the payment alleged to have been made by it, as guarantor, became thereby entitled to a lien upon the property of the railway company, through subrogation, then it would have been a proper party, as it would have been interested in the property proceeded against. It would, however, in no sense be an indispensable party, because it would not have been directly affected by a decree enforcing the liens held by the holders of the first and second mortgage bonds. The distinction between a person directly interested in a controversy and directly affected by the decree, and one only indirectly affected by the decree, is well stated by Mr. Justice Bradley in the case of *Williams v. Bankhead*, 19 Wall., 571. We do not think that the Kentucky Union Land Company was an indispensable, or even a proper, party."

It cannot be contended that by virtue of the traffic features of Contract "B," the Denver Company became either a necessary or a proper party. The traffic

rights acquired by the Western Pacific under Contract "B" were part of the security pledged. The bondholders of the Western Pacific had, by virtue of the very terms of Contract "B," the right to have the road sold with those traffic provisions in force, or by concurrent action of two-thirds in principal amount, to terminate these features. This was part of their contract and part of their security. To make the Denver a party for the purpose of cutting off any traffic rights which it might take under Contract "B," would necessarily result in the destruction of the dependent traffic rights of the Western Pacific Company, for the traffic features of the contract were mutually dependent. But, by the express provisions of Contract "B," the question of whether the road should or should not be sold with the traffic contract in force, rested with the holders of two-thirds in principal amount of the bonds, the power in trust to terminate the contract being vested in the Trustee. The traffic rights were the property of the Western Pacific Company, but subject to termination by the Trustee. The Denver Company had no right to terminate them in any event. The Denver Company was, therefore, not only not a necessary party, but not even a proper party in this aspect of the case. Certainly, it was in no sense an indispensable party, and under any circumstances the plaintiff had the right to proceed without it if it so desired.

The past advances made by the Denver Company

to the Western Pacific Company pursuant to the provisions of Contract "A" and Contract "B" were not either a legal or equitable charge upon the property of the Western Pacific Company. These advances were by the very provisions of the contracts no more than floating debt evidenced, or to be evidenced, by unsecured notes. So, in no aspect of the case was the Denver Company either a necessary or a proper party. But as it cannot even be claimed that that Company was an indispensable party, and as no party to the suit made any objection to proceeding without the presence of the Denver, the order of the Court directing that the Denver be made a party was absolutely void.

As said in *Greenleaf v. Queen*, 1 Peters, 138, 147:

"It was insisted by the counsel for the appellees, in anticipation of the above objection, that the Court below would have been warranted in dismissing the bill absolutely, without requiring anything to be performed by the new trustee, in consequence of the omission of the plaintiff in that suit to make proper parties.

"That a bill may be dismissed where the plaintiff, when called upon to make proper parties, refuses or is guilty of unreasonable delay in doing so, need not be questioned; but to do so without a demurrer, plea, or answer, pointing out the person or persons who the defendants insist ought to be made parties, is unprecedented."

In the absence of actual fraud the right to control the proceeding under the mortgage is vested in a majority of the bondholders, and they cannot be deprived of this right which forms part of their security.

The claim is asserted that the ordinary rules of law applicable to a case of this class do not apply, for the reason that the plaintiff is a trustee of the bond issue, and it is claimed that when the trustee of a bond issue sues to foreclose, all discretionary powers of the trustee are transferred from the trustee to the Court. This contention is an attempt to apply to foreclosure proceedings principles which apply only to suits of a very different class.

It is true that in an administration suit by a trustee against his beneficiaries, a trustee seeking the instruction of a court as to how it shall exercise its powers, cannot after *decree* exercise discretionary powers which are by the decree assumed by the court. This rule has no application to suits commenced by a trustee in execution, as distinguished from administration of the trust, and even in administration suits the rule does not apply before decree, for the trustee has full control of the action and may dismiss it.

Sellebourne v. Newport, 1 K. & J., 601.

The rule does not apply to a suit to collect a debt.

Neeves v. Burrage, 14 Q. B. R., 504.

In a suit by a trustee to foreclose a mortgage securing an issue of bonds, the conduct of the trustee is,

in the absence of any provision of the deed of trust or mortgage, controlled by a majority of the bondholders, and if, as in the case at bar, this right be expressly given by the mortgage or by the deed of trust, it constitutes a very part of the security itself, and cannot, in the absence of fraud, be wrested from the majority.

In *Shaw v. Railroad Co.*, 100 U. S., 605, the Court said:

"The trustees had an undoubted right to commence these suits when they did, and it is apparent from the whole record that all their proceedings, both before and after the sale, were in the interest of their beneficiaries generally, since one hundred and eighty in number, representing in the aggregate eight million out of the eight million five hundred thousand dollars of bonds outstanding, accepted the result and exchanged their bonds for stock in the new corporation. *To allow a small minority of bondholders, representing a comparatively insignificant amount of the mortgage debt, in the absence of any pretense even of fraud or unfairness, to defeat the wishes of such an overwhelming majority of those associated with them in the benefits of their common security, would be to ignore entirely the relation which bondholders, secured by a railroad mortgage, bear to each other.* Railroad mortgages are a peculiar class of securities. The trustee represents the mortgage, and in executing his trust may exercise his own discretion within the scope of his powers. If there are differences of opinion among the bondholders as to what their interests require, it is not improper that he should be governed by the voice of the majority, acting in good faith and without collusion, if what

they ask is not inconsistent with the provisions of his trust.

In *State v. Brown*, 21 Atl., 374, the Supreme Court of Maryland said:

"As to the appeal of Mr. Carter, trustee and executor, it is sufficient to say, if there is any difference of opinion among the bondholders whether their interests will be best subserved by these proceedings, the will of the majority must in this, as in other like cases, govern. The suit was brought by the trustees at the request of a majority of the bondholders, and so long as they act in good faith, and for the purpose of carrying out the trust reposed in them under the mortgage, a minority bondholder has no right to interfere with them in the discharge of their duty. *Shaw v. Railroad Co.*, 100 U. S., 605. A good deal was said about the veil which conceals the real motives that have prompted this litigation. Whatever they may be, we must deal with the case as it is presented by the record, and, so dealing with it, we are of opinion that the decree below must be affirmed."

In *Waldoborough v. Knox*, 24 Atl., 942, the Supreme Court of Maine said:

"Such bonds are often held by a great many persons, and, when they differ as to the best mode of rendering their security available, we think it is the right of the majority in interest to determine. The Court so held in *Shaw v. Railroad Co.*, 100 U. S., 605. The Court there said that to allow a small minority to defeat the wishes of an overwhelming majority of those associated with them in the benefits of the common security would be to ignore entirely the relations which bondholders,

secured by a railroad mortgage, bear to each other; and that, if differences of opinion exist among them, the voice of the majority ought to govern."

Such is the law in the absence of a specific provision in the mortgage. If, however, the mortgage contain a provision on the subject, it is controlling.

In *Gates v. Boston & N. Y. Air-Line R. Co.*, 5 Atl., 695-701, the Supreme Court said:

"So, too, in relation to the other bondholders, it is manifest that each bondholder enters into contract relation with each and all of his co-bondholders. His right to appropriate the security in satisfaction of his bond in such lawful manner as he may choose, is modified by the same existent right in every other holder. His absolute right of control is limited, not only by the express provisions of the bond and mortgage, but also, in great measure, by the peculiar nature and character of the security. *Canada Southern R. Co. v. Gebhard*, 109 U. S., 534, 537; S. C., 3 Sup. Ct. Rep., 363. 'To allow a small minority of bondholders, representing a comparatively insignificant amount of the mortgage debt, in the absence of any pretense, even, of fraud or unfairness, to defeat the wishes of such an overwhelming majority of those associated with them in the benefits of their common security, would be to ignore entirely the relation which bondholders secured by a railroad mortgage bear to each other. Railroad mortgages are a peculiar class of securities. The trustee represents the mortgage, and, in executing his trust, may exercise his discretion within the scope of his powers. If there are differences of opinion among the bondholders as to what their interests require, it is not improper that he should be governed by the voice of the majority acting in good faith and without collusion,

if what they ask is not inconsistent with the provisions of his trust.' *Shaw v. Railroad Co.*, 100 U. S., 611, 612."

"anything in this indenture contained to the contrary notwithstanding, the holders of a majority in amount of the bonds hereby secured and outstanding shall have the right from time to time, if they so elect and manifest such election by an instrument in writing executed and delivered to the Trustee, to direct and control the method of conducting any and all proceedings for any sale of the premises and property hereby conveyed, mortgaged and pledged, or for the foreclosure of this indenture or for the appointment of a receiver or for any other action or proceeding hereunder, and for such purpose to instruct the Trustee to exercise its rights of election to declare said bonds due or to waive the exercise of the same, or if exercised, to annul the same, or to institute, continue or discontinue any proceedings hereunder."

The Fact That the Assets of the Western Pacific Railway Were in the Hands of a Receiver Affords No Basis for the Order.

Our opponents seek to justify the order on the ground that the property of the Western Pacific Railway was in the hands of a receiver.

This fact, however, is quite immaterial. The appointment of a receiver in an action to foreclose a mortgage does not enlarge the issues or the jurisdiction of the Court as between the parties to the action.

As stated at the outset, Contract B contained three sets of covenants:

1. The covenant to pay to the trustee the difference

between the amount of interest due and the amount of interest paid by the Western Pacific Railway.

This covenant vested no property right in the Western Pacific. It was not pledged, for it did not belong to or run in favor of the Western Pacific, and only the rights of the Western Pacific were pledged. Moreover, by the terms of the mortgage it was expressly excluded from its operation.

Sec. 3, Art. V, Mortgage.

By the express terms of the contract it survived foreclosure sale and could not be sold.

The receiver did not take possession of any right under the covenant and the order appointing him could not have vested in him any right thereto.

Staples v. May, 87 Cal., 178.

2. The covenants in relation to traffic rights.

These covenants are assets of the Western Pacific Railway Company and must be sold with the property unless the bondholders elect to terminate them; the right to terminate these and all other provisions of the contract, except the covenant to pay to the trustee, being vested in two-thirds of the bondholders by the contract itself. *Yet the exercise of this right is now forbidden by injunction.*

3. The covenant to loan to the Western Pacific Railway a sum which when added to its other revenues

would be sufficient to pay taxes, maintenance, interest on first mortgage and sinking fund.

This covenant was an asset of the Western Pacific, but it did not give to that corporation any right to the possession of moneys essential to the payment of interest or sinking fund, for these payments were to be made to the trustee.

This covenant did not survive foreclosure and in all human probability could not be enforced by receivers who were not applying the earnings of the road to the payment of interest.

Its existence is, however, the sole ground for enjoining the trustee for the bondholders from prosecuting this action on the covenant running to the trustee alone.

It is asserted that the existence of this covenant forms a ground for directing that new parties be brought into this litigation and the entry of a decree delayed.

Assuming that this covenant survived and could be enforced by the receivers, it could not be enforced in this action but only in a suit by the receivers on the covenant. But the existence of such a right of action by the receivers was not a matter to be asserted in the suit to foreclose; *nor would the existence of a pending action to enforce this contract be a ground for refusing a decree in this suit.* Both *principal and interest of the bonds are due and the existence in the hands of the debtor of a contractual right to borrow money sufficient to pay interest, obviously cannot suspend the right*

of the creditor to have the pledged assets appropriated to the payment of principal and interest.

In addition to this, the very existence of this covenant was subject to the will of the holders of two-thirds in amount of bonds. The right to terminate the covenant being vested in the bondholders themselves, it follows as a necessary incident that no rights under this covenant could be asserted after default against the will of the holders of two-thirds in principal amount of bonds.

We submit that the Writ of Prohibition should issue as prayed.

PART II.

THE COURT ERRED IN ENJOINING THE PROSECUTION OF THE DEPENDENT BILL IN NEW YORK.

The Maintenance of the Action in New York is not an Interference with the rights of the Receivers and does not constitute a Contempt.

(a) The provisions of Contract "B," by which the Denver Company made itself surety to the Trustee for the obligations of the Pacific Company as to interest and sinking fund payments, are not in any sense assets of the Pacific Company.

Jones on Corp. Bonds and Mortgages, §274a (3rd Ed.).

In *Winthrop Nat. Bank v. Minneapolis, etc. Co.*, 77 Minn., 329, 79 N. W., 1010, the Court said:

"It is impossible to conceive how the right of the bondholders to pursue the living guarantor, or the representatives of the estate of the one who is dead, upon their contract of guaranty, or the other right as against the property mortgaged by these guarantors, can be regarded as assets, legal or equitable, of the defendant corporation, which must be resorted to or exhausted before judgment as demanded and ordered can be entered in this action. Langdon and Hinkle became personal sureties in behalf of the corporation, and also sureties, as mortgagors of their property; and the liability which they incurred as such sureties is not an asset of their principal."

(b) The right asserted by the Trustee in the dependent bill is not a right to property, to the possession of which the Receivers are entitled, for Contract "B" expressly provides that the Pacific Company shall have no right to the money to the payment of which the Trustee is entitled.

"Neither the Pacific Company nor anyone claiming under it, save only such persons or corporations as may be entitled to receive the interest upon said First Mortgage Bonds, shall be entitled to or possess any interest in, lien upon or claims to said fund, or any part thereof."

Sec. 4 (d), Art. II (p. 12), Contract "B."

The right asserted against the Denver Company by the trustee is neither a property right of the corporation whose assets are in the hands of the Receivers nor is it a right to property, to the possession of which the Receivers are entitled.

(c) The fact that the right asserted is found in a written instrument to which the Pacific Company and the Denver Company and the Trustee are all parties, does not affect the question, as the provisions sued on are separate, severable, independent provisions operating between the Denver Company and the Trustee alone. The contract itself expressly declares this to be the case.

Sec. 4 (a), (e), Art. II, Contract "B";
 Sec. 10, Art. VI, Contract "B."

Indeed, the provisions sued on survive and endure after the property of the Pacific Company has been sold and every other provision of Contract "B" abrogated.

Sec. 14, Art. VI, Contract "B";
 Sec. 3, Art. V, Contract "A";
 Sec. 9, Art. IV, Contract "A."

(d) If the Trustee had loaned at interest part of the sinking fund which had already been paid to it, undoubtedly it could sue to recover the same, without leave of the Court; and its right to sue to recover interest and sinking fund payments not paid, without such leave, is equally clear. In so doing, it does not seek to recover property, to the possession of which the Receivers are entitled.

The obligation runs directly to the Trustee, and even if its rights are those only of a pledgee, the

powers of a pledgee in possession are not suspended by a receivership; indeed, property in pledge can be sold without leave of Court.

Fidelity Ins. Co. v. Roanoke Iron Co., 81 Fed.,
439, 445;

Guaranty Trust Co. v. Galveston City R. R.,
877 Id., 813.

Indeed it is well settled that the holder of a power of sale over mortgaged property can exercise that power after the initiation by him of foreclosure proceedings and during the pendency thereof.

Mayall v. Eppinger, 127 Cal., 5;

Brisbane v. Stoughton, 17 Ohio, 482.

So even if the object of making the direct covenant with the Trustee was merely that of vesting the legal right to the chose in action in the Trustee, that has been done; and that legal right can be exercised by the Trustee even if the Trustee be regarded as a mere pledgee.

(c) The right of the Trustee to recover on the contract of suretyship is not the same as that of the Pacific Company on the agreement to loan. The obligation to buy notes of the Pacific Company is measured by the difference between gross earnings and the amount required. The obligation to pay to the Trustee is measured by the difference between the amount actually appropriated and paid and the amount due.

Sec. 7, Art. VI, Contract "B";
 Sec. 4 (a), Art. II, Contract "B."

(f) The Receivers of the Pacific Company are not entitled to the possession of the moneys provided to be paid by the Denver Company to the Trustee, even if the right to have these moneys paid be one which they can enforce. This specific property is not receivable by the Company and a suit to recover the same does not constitute an interference with the rights of the Receivers for this reason, if for no other, and, therefore, cannot be enjoined.

Re West Lancashire R. R., 63 Law Times, 56.

The fact that the Pacific Company is Named as a Party defendant in the Action in New York merely for the Purpose of an accounting is not a ground for the Issuance of an Injunction forbidding the prosecution of a suit by the Equitable Trust Company against the Denver Company to recover interest and sinking fund payments on Contract "B."

(a) The fact that the property of the Pacific Company is in the hands of Receivers appointed pending foreclosure does not prevent that corporation being made a party to an action in which no judgment for property in the hands of the Receivers is sought.

Decker v. Gardner, 124 N. Y., 334.

(b) Where a cause of action arises on contract prior to the appointment of receivers, it seems the receivers

are neither necessary nor proper parties, unless the contract be affirmed.

Northern Pacific R. Co. v. Hefflin, 83 Fed., 93.

(c) Corporate existence is neither destroyed nor suspended by the appointment of a receiver in an action to foreclose a mortgage; and if no execution against property in the hands of the receiver is sought, the corporation may be made a party for purposes of an accounting in an action in which a third person's liability depends on the condition of the accounts between the corporation and that person.

Re West Lancashire R. R., 63 Law Times, 56.

(d) Even if the Pacific Company cannot be sued without leave of Court, the action may be continued against the Denver Company; and the question of whether or not the action shall be so continued is a question for the New York Court.

Patterson v. Stewart, 41 Minn., 84, 16 Am. St. Rep., 671.

The commencement of the action to foreclose the Pacific Company mortgage did not deprive the Equitable Trust Company or the bondholders of the right to control proceedings against the Denver Company on the contract of suretyship.

(a) The Denver Company is not a party to the action pending in the District Court, and the rights of the Trustee and bondholders against the Denver

Company have not been submitted to that Court for adjudication.

(b) Any judgment which that Court might render against the Denver Company and in favor of the Equitable Trust Company would be void on its face.

(c) Contract "B" gives complete control over proceedings against the Denver Company upon its obligations as surety to the bondholders.

(d) If the bondholders see fit to direct the Trustee to obtain judgment against the Denver Company before or after obtaining judgment of foreclosure against the Pacific Company, they have the right to do so. This right is expressly accorded them by Contract "B."

(e) Equity rule No. 42 accords to plaintiff the absolute right to proceed against the Pacific Company and the Denver Company separately. This rule is binding on this Court, and the Equitable Trust Company cannot be deprived of the rights accorded by it.

"In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the Court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable."

Rule 42 of Rules of Practice for the Courts of
Equity of the U. S.

(f) Where separate causes of action exist, the initiation of a proceeding on one of the causes of action does not confer jurisdiction over the other. If the second cause of action be initiated in a court of concurrent jurisdiction, the court in which the first cause of action has been initiated may continue the case pending before it if it believes the cause of action pending before it should only be determined after the second cause of action has been passed upon. It cannot, however, deprive the court which first obtained jurisdiction of that cause of the right of proceeding; nor can it enjoin the plaintiff from proceeding in a court of concurrent jurisdiction for relief not sought in the first action.

In *Buck v. Colbath*, 3 Wall., 334, the Court said:

“Seizing upon some remarks in the opinion of the Court in the case of *Freeman v. Howe*, not necessary to the decision of that case, to the effect that the Court first obtaining jurisdiction of a cause has a right to decide every issue arising in the progress of the cause, and that the Federal Court could not permit the State Court to withdraw from the former the decision of such issues, the counsel for plaintiff in error insists that the present case comes within the principle of those remarks.

“ * * * But it is not true that a Court, having obtained jurisdiction of a subject matter of a suit, and of parties before it, thereby excludes all other Courts from the right to adjudicate upon other matters having a very close connection with those before the first Court, and, in some instances, re-

quiring the decision of the same questions exactly.

"In examining into the exclusive character of the jurisdiction of such cases, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits. For example, a party having notes secured by a mortgage on real estate, may, unless restrained by statute, sue in a court of chancery to foreclose his mortgage, and in a court of law to recover a judgment on his notes, and in another court of law in an action of ejectment to get possession of the land. Here in all the suits the only question at issue may be the existence of the debt mentioned in the notes and mortgage; but as the relief sought is different, and the mode of proceeding is different, the jurisdiction of neither Court is affected by the proceeding in the other. And this is true, notwithstanding the common object of all the suits may be the collection of the debt. The true effect of the rule in these cases is, that the court of chancery cannot render a judgment for the debt, nor judgment of ejectment, but can only proceed in its own mode, to foreclose the equity of redemption by sale or otherwise. The first court of law cannot foreclose or give a judgment of ejectment, but can render a judgment for the payment of the debt; and the third court can give the relief by ejectment, but neither of the others. And the judgment by each court in the matter properly before it is binding and conclusive on all the other courts. This is the illustration of the rule where the parties are the same in all three of the courts."

The lower Court acquired jurisdiction only of the controversy presented by the pleadings as they stand.

Watson v. Jones, 13 Wall., 679, 716-17.

See also:

Nelson v. Camp, 191 Fed., 712;

Mercantile Trust Co. v. Lemoille, etc. R. R. Co., 16 Blatchf., 324.

The District Court has no power to interfere with the proceeding pending in New York.

The pending suit in the District Court of the United States for the Southern District of New York was instituted by the filing by The Equitable Trust Company of New York of its bill against The Denver & Rio Grande Railroad Company, which is a corporation formed by the consolidation of the Denver Company and the Western Company, parties of the first part to Contract B. The bill prays that the amount due under Contract B. from the defendant to the plaintiff, as Trustee for the holders of bonds secured by the First Mortgage of the Western Pacific Company, be determined, that it be adjudged to be a charge upon the property of the defendant, and that the charge be enforced by foreclosure.

The form of the bill in that suit was evidently governed to some extent, if not chiefly, by the urgent necessity that individual holders of bonds secured by the Western Pacific Company's First Mortgage who had instituted or were threatening to institute actions in their own behalf for the recovery from the Denver & Rio Grande Company of their proportionate shares of the amount of its liability under Contract B., should

be restrained from prosecuting such actions, to the end that the liability of the Denver & Rio Grande Company should be enforced for the equal and proportionate benefit of all the bondholders according to the terms of the contract.

The suit was instituted by the plaintiff as Trustee for the bondholders, and in its own name and right and for its own benefit as such. It could not have been successfully instituted in the name of or for the benefit of the Western Pacific Company, because the money sought to be recovered was provided in the contract, which is the subject matter of the suit, to be paid to the Trustee; and the right to receive it was expressly given to the Trustee by the obligor in the contract. It is contended, however, that because Contract B. provides generally that actions for the enforcement of the covenants in the contract may be brought by the Pacific Company as well as the Trustee, that provision applies to the covenant upon which this suit was brought; and the Pacific Company had, and the receivers in its stead have, a right of action upon it.

If it were true that the receivers have a right of action against the Denver Company upon this liability, the only form of action open to them would be, of course, an action in equity for specific performance of the contract to pay money to the Trustee; because it is the Trustee alone which is entitled to receive it. But it is clear that the Pacific Company could not

prevail in an action for specific performance, because it is itself in default in the performance of its covenants contained in the contract. We do not leave out of consideration the provision in the contract that the refusal or failure for other reasons of the Pacific Company to perform its covenants shall not constitute ground for refusal of the Denver Company and the Western Company to perform theirs. But we submit that that provision would not compel a court of equity to decree specific performance of the covenants of the Denver Company and the Western Company at the suit of the Pacific Company. Specific performance is not a matter of right. Granting it is in the sound discretion of a court of equity. It is fundamental and jurisdictional that it will not be awarded unless the plaintiff is ready and willing to perform; and it will not even then be awarded if it will result in severe hardship.

It must be clear that the provision that the Denver Company and the Western Company must perform their covenants in any event was placed in the contract for the protection of the Trustee only, and not for the benefit of the Pacific Company. If it were not there, the contract would be worthless to the bondholders. The members of the railway family could agree to violate it reciprocally as they pleased.

We think, then, that the realizing against the Denver Company is in jeopardy if the Trustee be enjoined in this court from prosecuting its action. We think

that it is not only the proper party to sue, but, as well, the only party which can sue on the claim. If this court shall prevent its doing so, it will deprive it of a substantial and valuable property right without due process of law; and its action will be void.

With regard to the contention that the suit should have been brought in this court instead of in the New York court, we protest again that there has been no disposition to evade this court. No idea of proceeding in this court was ever entertained, before the suit was brought. The Denver Company has no property in this district and it is at least doubtful whether jurisdiction over its person could be had here without its consent. Be that as it may, this court would certainly not have power to enforce by foreclosure a charge against its property. Upon no consideration, therefore, would suit in this court have been advisable.

Prior to the institution in the New York court of the suit of The Equitable Trust Company against the Denver and Rio Grande Railroad Company, the receivers appointed in this suit in California, had presented to this court their petition asking that they be allowed six months from the date of the petition within which to present to this court all matters connected with certain specified contracts, including Contract B., between the Western Pacific Company and the Denver & Rio Grande Company; and that, in the meantime, they "be authorized and directed to continue the operation of said railroad" (the

Western Pacific) "under said contracts without prejudice, however, to any rights arising or accruing therefrom." It may be observed in passing that this petition made no reference to the rights of The Equitable Trust Company against the Denver and Rio Grande Company arising out of the agreement of suretyship in Contract B.

The committee of holders of bonds of the Western Pacific Company, representing nearly forty-one millions of dollars face value of such bonds, had requested The Equitable Trust Company, as trustee for the bondholders, to enforce the liability of the Denver and Rio Grande Company under its agreement of suretyship contained in Contract B.; and the suit in New York was instituted in compliance with that request and in performance of the duty to that end imposed upon the trustee by the terms of that contract.

Counsel for The Equitable Trust Company residing in California knew of the filing of this petition, but did not know that the suit in New York was impending. Counsel for The Equitable Trust Company residing in New York did not know, when the bill in the New York suit was filed, that this petition had been presented to this court or that any such petition was contemplated; nor did any member of the committee of bondholders who requested that the suit be begun, so far as we have been advised. It seems impossible, then, to predicate, upon the fact that the New York suit was instituted after this pe-

tition was filed, or upon any other aspect of the matter, any suspicion that the action of any of those who were responsible for the institution of the suit in New York was instigated, or precipitated as to time, by the desire to evade the jurisdiction of this court or to trespass to any extent upon its prerogatives; but, nevertheless, we wish again to protest that no such desire was ever entertained in the matter, much less acted upon.

PART III.

THE ACTION OF THE COURT IN REFUSING TO ENTER A DECREE IN ACCORDANCE WITH THE STIPULATIONS OF THE PARTIES, OR, IN THE ALTERNATIVE, REFUSING TO SET THE CAUSE FOR HEARING, WAS A PLAIN ABUSE OF DISCRETION.

It is well settled that this Court has jurisdiction to issue a Writ of Mandamus, directing the lower Court to hear and determine a cause pending before it, when that Court refuses so to do on account of reasons insufficient in law.

Barber Asphalt Co. v. Morris, 132 Fed., 945;
McClelland v. Carland, 217 U. S., 268.

On mandamus the Court is not confined to questions of jurisdiction, as is the case on prohibition. If, therefore, the refusal of the Court to decide the cause after all parties had consented to a decision was plainly erroneous, that error can be corrected on mandate.

Horsburgh v. Murasky, 169 Cal., 500.

There can be no doubt that the action of the Court in refusing a decree was erroneous. Even if the Court were correct in ordering that the Denver Company be made a party (which it was not), that was no ground for refusing to proceed and foreclose. The guaranty of the Denver ran only to interest and sinking fund, and as the principal of the bonded debt was due, it was absurd to postpone foreclosure sale in order to determine whether the interest and sinking fund guaranteed could be collected.

The sinking fund was but \$50,000 per year, and it would require approximately 1,000 years for these payments to equal the amount of principal due and payable forthwith.

The claim that one holding a debt secured by mortgage could not collect by foreclosure the principal of the debt then due, merely because it might be possible to collect interest from one who had guaranteed payment of interest, is absurd.

On hearing of the motion to set, the following dialogue took place:

THE COURT—That does not answer the question. The question is what are the rights of the bondholders of the Western Pacific under that contract; and if they are such as are seriously claimed for them, counsel can readily perceive that if the Denver & Rio Grande can be held responsible, and is able to respond, there would be nothing left here as requiring a sale of the physical properties of this road to meet those obligations.

MR. HOW—I should not off-hand, your Honor,

be of the opinion, nor should I be willing to assent to the proposition, that a right to foreclose a mortgage is gone merely because a surety upon a debt secured by the mortgage is good. I think the right to foreclose the mortgage is an independent right.

THE COURT—I am not saying that that is not true; what I am saying is that it might readily be found that it would not be necessary to sell this property. It does not follow necessarily that it would not. I am not prepared to say that it would not. But, certainly, in proceeding to determine the up-set price—in providing a decree for the sale of this property an up-set price for the disposition of this property under a sale—the Court would have to be afforded, it seems to me, the information which would come as a result of determining the character and the extent of that security afforded by the provisions of Contract B.

MR. HOW—In that position, your Honor, I will say that my associates and apparently all parties to the action disagree in your Honor's statement of the law.

This dialogue shows that the Court was either ignorant of the character of the proceeding before it, or was acting on some legal theory unknown in the jurisprudence of this country.

In view of the facts disclosed by the affidavits, the refusal of the Court to set the cause or make the decree, coupled with its declared intent to postpone a decision on the motion till after a decision by this Court, was in effect a denial of the motion.

The Claim Asserted by the Petitioners in Intervention That No Decree Should Be Entered Because the Obligations of the Denver Company Under Contract B are Secured by an Equitable Charge on the Properties of the Denver Company, Affords No Basis for Refusing a Prompt Decree.

We have already shown that the existence of the collateral obligation of the Denver Company to pay interest and sinking fund gives no excuse for refusing a prompt decree.

It is, however, asserted that this obligation is secured by an equitable charge upon the properties of the Denver Company. If that be true such charge runs in favor of the Equitable Company as Trustee, and could not be foreclosed in this suit or in the Northern District of California or any jurisdiction other than that in which at least some of the property is situated. The assertion is predicated upon the provision of the contract declaring that the covenants of the Railway Companies parties to Contract B shall run with the respective railways of the parties. The contract contains a further provision declaring that the successors of either party shall be bound by an express trust to perform the obligations of such party.

In view of the decisions of the Supreme Court of the United States in *Des Moines R. R. v. Wabash*, 135 U. S., 576, it is difficult to declare just what the ultimate effect of these covenants may be. In that case it was held that a similar covenant did not create a lien taking priority to a mortgage subsequently executed. It is therefore a matter of doubt whether if a

lien exists it takes priority to the adjustment and re-funding mortgage of the Denver Company, even if it can be established that the purchasers of bonds secured by those mortgages took with actual notice. Assuming that such charge exists, its assertion and complete enforcement at the present time will result in a receivership of the Denver Company and many years of litigation must ensue before the fact and the rank of the lien is established.

Without in any way abandoning the claim that such a lien exists and is in fact prior to the bonds of the Denver Company secured by the adjustment and re-funding mortgage, the majority of the bondholders of the Western Pacific Railway assert that they have the right to realize upon the security mortgaged to secure both principal and interest of the debt owing to them without waiting till the value and rank of the guaranty is established and enforced.

Clearly, the right to realize upon the property mortgaged is not and cannot be suspended because the guarantee of the interest may be secured by an equitable charge.

Of course, the existence of these provisions purporting to create covenants running with the land do not make the Denver Company either a necessary or a proper party to the foreclosure suit. This is decided in the case of *Des Moines R. R. Co. v. Wabash Ry. Co.*, 135 U. S., 576, 581, where that court denied the right of one railroad to intervene in proceedings

to foreclose a mortgage upon another road, though the roads had entered into a contract providing:

"This contract and any damages for the breach of same shall be a continuing lien upon the roads of the two contracting companies, their equipment and income, in whosoever hands they may come, the lien on the Adel road being limited to so much thereof as lies between Waukee and Panora."

and the mortgage in process of foreclosure was executed after the contract.

Respectfully submitted,

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Amici Curiae.



IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

Ex parte Equitable Trust Company of
New York, Original No. 169.

In the Matter of the Petition of The
Equitable Trust Company of New York,
as Trustee, for a Writ of Mandamus,
Original No. 2757.

In the Matter of the Appeal of The
Equitable Trust Company from the
Order Issuing the Injunction, dated
February 21, 1915.

**Supplemental Brief of Petitioners
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Filed this.....day of March, 1916.

F. D. MONCKTON, Clerk.

By....., Deputy.

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SUPPLEMENTAL BRIEF OF PETITIONERS
AND APPELLANTS.

THE CONTENTION OF COUNSEL FOR RECEIVERS AND
RESPONDENTS THAT, EVEN THOUGH THE LOWER
COURT HAS ERRED, AND HAS EXCEEDED ITS AU-
THORITY, NO REMEDY CAN BE FOUND IN THESE
PROCEEDINGS, IS BASED ON A MISCONCEPTION OF
THE RECORD, AND IS UTTERLY UNFOUNDED.

TRUE CONDITION OF THE CAUSE.

On February 21, 1916, the lower court made an
order directing that the Denver & Rio Grande be

made a party to the suit in foreclosure, in order that the guaranty of interest and sinking fund contained in "Contract B" might be enforced against that Company. This order was made in an action brought solely for the foreclosure of the Mortgage on the properties of the Western Pacific.

In addition to the authorities heretofore cited, showing that the order in question is void, we beg leave to refer the Court to the following cases:

Towle Brothers v. Quinn, 141 Cal., 385.

In this case the Court said:

" . . . We think that in this action to foreclose a mortgage, which is based on Section 726 *et seq.* of the Code of Civil Procedure, the court had no power to reach its hands over into the separate and independent action for participation, and take control and jurisdiction of such action. It had merely jurisdiction to foreclose the mortgage sued on, and order the mortgaged premises sold, and to foreclose the rights of all parties holding under and subject to the mortgage."

In *Joy v. Jackson & Michigan Plank Road Company* (11 Michigan, 155), the Court held that:

"Sureties who have undertaken, not for the payment of the mortgage debt, but that the mortgagor shall provide a *sinking fund* in certain specified securities for its payment, cannot be joined as defendants in a suit to foreclose the mortgage."

In *O'Connor v. Nadel* (23 Southern, 532), the Su-

preme Court of Alabama held that "a bond given to
 " a mortgagee on the same day the mortgage was
 " given, but not executed by the mortgagor, though
 " given to secure the same debt, is no part of the
 " mortgage, and those who signed the bond are not
 " necessary parties in an action to foreclose the mort-
 " gage."

The Court of Appeals for the Eighth Circuit has
 declared:

"The pendency in a state or other court of an
 action *in personam* which involves no issue of
 which the federal court has acquired exclusive
 jurisdiction, no claim to or lien upon specific prop-
 erty in the possession or under the dominion of a
 federal court of equity, presents no ground to sus-
 tain a dependent bill to stay the action."

"The subject of a suit to foreclose a mortgage is
 the specific property mortgaged. Its object is the
 subjection of all liens thereon to that of the mort-
 gage and the application of the specific property
 to the payment of the mortgage debt."

Guardian Trust Co. v. Kansas City Sou. Ry.,
 146 Fed., 337.

In *Steele v. Grove* (67 N. W., 963-5), the Su-
 preme Court of Michigan said:

"1. The relator was not a party to the foreclos-
 ure suit. It is true that he might be made a party
 under the provisions of section 6704, How. Ann.
 St., so that an execution for deficiency might have
 been issued against him, as well as the mortgagor,
 for any balance of the debt remaining unsatisfied

after a sale of the mortgaged premises. This section of the statute does not make it mandatory upon the plaintiff to make one who is a mere endorser upon the note a party defendant in the mortgage foreclosure. The statute is simply permissive. Under the original equity jurisdiction, there was no power to make personal decree against even the mortgagor himself; but this is a statutory innovation, as is also the enforcement in the foreclosure suit of the collateral obligations of third persons, and the jurisdiction by the statute over this latter class of persons is permissive only, and not obligatory. *Johnson v. Shepard*, 35 Mich., 115. It is true that upon foreclosure, where one is not primarily liable upon the mortgage debt, no personal liability can be enforced against him until the land is sold and the deficiency reported. *Howe v. Lemon*, 37 Mich., 164."

See also:

Johnson v. Shepard, 35 Mich., 115.

There is, we submit, no doubt that the Court had no right to inject into the foreclosure proceeding an action against the Denver Company, in order that its liability for interest and sinking fund might be enforced. This, however, is exactly what the Court did. The order of February 21, 1916, was made for the purpose of bringing the Denver Company in so that the rights of the Trustee and Bondholders against that corporation to recover from it the interest and the sinking fund might be enforced in this proceeding. Though this order is void, the lower court refuses to hear the cause presented by the pleadings, or to make a decree, though the cause is ripe for

decree, the refusal being predicated on the existence of the void order. No other ground for the refusal to enter the decree forthwith has been suggested either by the Court or by the Receivers, and *it is conceded by the Court that the decree should be entered forthwith if this order be void.* The following extracts from the transcript of the proceedings annexed to the petition for mandamus demonstrate that such is the fact:

“MR. PARTRIDGE— . . . The reason, and the only reason why the Receivers want to be heard or to object to the application of Mr. How here today, is this: That they believe that this guarantee of the Denver & Rio Grande Railroad is a mortgage upon its property, that this mortgage is prior and superior to its first and refunding Fives, and to its adjustment Sevens, and that that can be established thoroughly in this court with the proper parties before it, that that lien is superior to the lien of those two interests in the amount of \$43,000,000. Furthermore, if that can be established in this court by the Receivers, or the Equitable Trust Company, that that, together with the earnings of the Western Pacific, will be more than sufficient to pay the full interest on the bonds of the Western Pacific and the sinking fund besides.”

On the hearing the Court declared, in speaking of the same subject:

“If it has jurisdiction, Mr. How, I think the Court has intimated sufficiently throughout the long argument that was had, and the discussion of that order to show cause, and what it says in its opinion as well, that in its view there can be no

competent marshaling or fixing of the value of this property for the purpose of sale, for the essential purpose of fixing an up-set price, without construing the extent and character of the guarantee given in that contract by the Denver & Rio Grande, because if that contract carries a right of protection to the extent that is contended on one side that it does, it might never be necessary to sell the property of the Western Pacific,”

and Mr. How thereupon stated:

“That protection has not been afforded it—if it had been the mortgage of the Western Pacific would not have gone into default.”

“THE COURT—That does not answer the question. *The question is what are the rights of the bondholders of the Western Pacific under that contract, and if they are such as are seriously claimed for them, counsel can readily perceive that if the Denver & Rio Grande can be held responsible, and is able to respond, there would be nothing left here as requiring a sale of the physical properties of this road to meet those obligations.*”

And again the Court declared:

“If the Court of Appeals shall determine that this Court is wrong in its view that Contract B must be interpreted here and may be disposed of like any other piece of physical property that is pledged under a mortgage there will be no difficulty at all in wiping the slate clean in a very quick and expeditious way, thus disposing of all the difficulties. All I desire to see is that the jurisdiction of this Court is exercised in a manner so as to leave no stain on the question of its having protected those whose rights are before it for protection.”

And again:

"THE COURT—I am inclined to think that if you take a different view from that of this Court that it should have the advice of the Circuit Court of Appeals under your application for a writ of prohibition as to whether it is right in the order it has issued bringing in the Denver & Rio Grande as a party to this action with a view of construing competently the provisions of Contract B, that that would be a very proper course to pursue."

The position of the lower court as shown by the record is this: The lower court has made an order directing that there be submitted to it a controversy concerning which its jurisdiction has not been invoked by the parties. It has declined to enter a decree in the cause submitted to its jurisdiction and will not enter a decree until the controversy over which it has no jurisdiction is disposed of or the advice of the Court of Appeals concerning the correctness of the decision bringing in new parties is obtained. The case is, in legal essence, no different from the Morris case. There the Court refused to go to a decree until a decision had been rendered in the State's court construing a State statute. Here the Court refuses to go to a decree until it has rendered a decision on a question over which it has no jurisdiction. In both cases there is a refusal to act for a cause insufficient in point of law.

The Judicial Code provides (Sec. 262):

"The supreme court and circuit courts of ap-

peal, and district courts, shall have power to issue all rights not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law."

In *ex parte Metropolitan Water Company* (220 U. S., 539), the lower court vacated a restraining order which it had no jurisdiction to vacate. There was no appeal from such order. The Supreme Court said:

"This being the case, it necessarily follows that mandamus is the proper remedy, since the section made no provision for an appeal from an order made by a single judge denying an interlocutory injunction and the right of appeal is not otherwise given by statute."

It is obvious that if a cause cannot be kept in the lower court for all eternity by orders directing that there be litigated therein, matters over which the lower court has no jurisdiction, a writ of prohibition enjoining the enforcing of such an order and a writ of mandate compelling the entry of a proper decree are both authorized by the Judicial Code and by the decisions of the courts:

Ex parte Metropolitan Water Co., 220 U. S., 539;

Barber Asphalt Paving Co. v. Morris, 132 Fed., 945;

McClellan v. Carland, 217 U. S., 268;

In re Rice, 155 U. S., 396;

In re Dennett, 215 Fed., 673.

THE CLAIM THAT EQUITY RULE 37 SANCTIONS THE
MAKING OF AN ORDER SUCH AS THAT HERE MADE
IS WITHOUT FOUNDATION.

Rule 37 provides: "Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when anyone refuses to join, he may for such reason be made a defendant.

Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

The clause of the Rule declaring that "any person may be made a party if his presence is necessary to a complete determination of the cause," does not give to the Court the power to make the person a party

upon its own motion, and without an amendment of the pleadings.

Statutes allowing parties to be brought in by the Court on its own motion have no such effect, for, as said in *Doke v. Williams* (34 So., 569) :

“To make a new defendant to a bill, claiming in a right not noticed by the bill, would throw the rules of chancery pleading into utter confusion, for it would be to try rights without any issue between the parties.”

The rule, however, does not purport to authorize the Court to act on its own motion, or to set aside settled principles of equity. Indeed, the rule, by necessary implication, denies to the Court power to require the presence as a party of one not necessary to a proper and complete determination of *the cause presented by the pleadings*. Certainly the rule does not abrogate the rights granted by Rule 42, which provides:

“Rule 42. JOINT AND SEVERAL DEMANDS—In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.”

Rights created and recognized by rules of equity, such as this, are not abrogated even by rules author-

izing the addition of parties to a cause by the Court of its own motion:

THE RECEIVERS ARE NOT NECESSARY PARTIES TO THE APPEAL, NOR IS THE ORDER APPEALED FROM AN ORDER IN CONTEMPT. IT IS AN INJUNCTION.

On June 11, 1915, the District Court made an order reciting that the Receivers had filed in the court a contract between the Denver & Rio Grande and the Western Pacific Railway, together with other contracts, and asked six months' time to investigate all things in connection with the contract and to report this to the Court with their recommendations or advice. It is also recited that an action on Contract B has been commenced in New York against the Western Pacific and Denver & Rio Grande Railways, such action having been commenced on the 27th of May, 1915. It is further recited that on June 3rd, 1915, the Receivers filed a petition requesting instructions as to whether or not they should sue the Denver & Rio Grande Railroad on Contract B. It is then ordered that the Equitable Trust Company of New York appear before the Court on the 21st of June, 1915, and show cause, if any it has, why it should not be enjoined and restrained from further proceedings in the suit in New York. It is further ordered that in the meantime and until the hearing and determination of the order to show cause the Equitable Trust Company be restrained from further proceedings in the New York suit.

The foregoing matter appears in "Exhibit 19" of the Petition for Prohibition.

Prior to the hearing of the order to show cause the Equitable Trust Company filed its answer. The answer presented the primary objection that the order to show cause was not founded on any petition or pleading. The answer continued, declaring that the Court was wholly without jurisdiction to enjoin the complainant from proceeding on Contract B, declaring that the complainant had not sought, and did not seek by its suit in New York to do anything other than enforce the liability of the Denver & Rio Grande Railroad under Contract B; that the action pending in the District Court of California was an action to foreclose a mortgage and nothing else, and that the issuance of such restraining order would constitute an unlawful taking of property; that the complainant claims a right under the Constitution and Laws of the United States to select the forum in which it chooses to enforce its right under Contract B, and that this constitutional right was not surrendered by invoking the jurisdiction of the District Court of the United States for the Northern District of California by the suit in foreclosure. The answer sets up various other objections (See "Exhibit 20," Petition for Prohibition).

It is contended by counsel for the Receivers that they are necessary parties to the appeal from the injunction issued on this order to show cause, on the

theory that the order to show cause and the following injunction was made at their instance. Nothing in the record supports this contention, and the proceedings in the lower court completely negative it. Prior to the making of the order to show cause there came on for hearing in the lower court the Petition of the Receivers concerning instructions. At that hearing the pendency of the New York suit was mentioned and concerning that suit the Court said:

“THE COURT—As I have indicated, I am very strongly of the view, from the reading of this contract, that the trustee is charged with the enforcement at least of these particular features of this contract; but the question which arises in my mind is whether or not that trustee having submitted the entire controversy to this court by asking its interposition in equity and for the appointment of a receiver has not subjected itself to the control of this court in directing when and perhaps in what form it shall proceed to enforce those rights; that is so that the administrative court may be able to see that it is being done under circumstances that will redound to the benefit rather than to the destruction of the property of the corporation.”

The following colloquy also took place between Mr. Olney, one of the Receivers, and the Court:

“MR. WARREN OLNEY, JR. — If your Honor please, before Mr. Partridge proceeds I would like, if I might, to say a few words here not by way of arguing any legal proposition but as directing myself to the question of policy which is involved here. Mr. Partridge's views and my

own in regard to this matter of policy are not wholly in accord and I would like, if possible, to place my position in that respect before your Honor.

I have assumed all along that it was within the legal right of the trustee to maintain this suit; that is to say, the trustee either authorized by this court or otherwise could maintain the action. I have assumed also that it was probable that the Receivers themselves might maintain an action against the Denver & Rio Grande upon this guaranty. It simply became a question of policy as to whether or not the Receivers under those circumstances should themselves commence that suit.

"THE COURT—Well, of course, the Receivers would not and could not commence such a suit without the advice of the Court.

"MR. OLNEY—We have asked for instructions here not upon anything else but upon that very point, viz., as to whether or not the Receivers should be instructed to commence an action against the Denever & Rio Grande upon this guaranty. In that petition there is no recommendation as to what instructions should issue. Mr. Partridge has appeared here and apparently has urged that instructions issue that he commence the action—

"THE COURT—I do not understand Mr. Partridge to take that view. He simply asks upon the general instructions of the court. I do not understand you, Mr. Partridge, as urging that the court should direct the Receivers to commence this action

"MR. PARTRIDGE—On the contrary, if your Honor please, I specifically stated in the beginning that as representing the Receivers we were asking for instructions, not for any specific instructions.

"THE COURT—That was my understanding, Mr. Olney.

"MR. PARTRIDGE—I certainly had no in-

tention of in anyway representing to your Honor that the instruction they wanted was that one.

"MR. OLNEY—No, Mr. Partridge, and I did not intend to insinuate or to state that you stated that that was the instruction which the Receivers themselves wished. I said I thought that was your view of it.

"MR. PARTRIDGE—That is my personal view of it.

"MR. OLNEY—The view you have been urging upon the court here. That is as far as it went.

Now, so far as the dealings of the court with this trustee in New York is concerned, I have nothing whatever to say. If your Honor concludes that the trustee should have brought the suit here, or should be restrained from proceeding further with the suit there, that is nothing in itself and of itself concerns the Receivers and I have nothing to say about it. The point to which I wish to direct myself solely is the point I understood was up here in connection with the petition, and that is, as far as the petition itself certainly goes, the request for instructions as to whether or not the Receiver shall commence this action—

"THE COURT—I think you need not consume any time on that, Mr. Olney, because I certainly would not instruct the Receivers at this time to commence this action.

"MR. OLNEY—Then I have nothing further to say, your Honor.

"THE COURT—And I did not understand that that was the request here. The prayer of the petition I see is as to whether they should be instructed.

"MR. OLNEY—That is the only point upon which we have requested instructions, if your Honor please, just that one thing."

Towards the conclusion of the discussion the Court said:

“ . . . In brief, my mind is firmly of this conviction: I cannot for a moment entertain the proposition that this court is so helpless in the administration of a great property of this kind under the bill that has been filed here so that it cannot control the action of any party connected with the suit, either directly or indirectly, with reference to litigation which involves the property or any of the subsidiary interests which are within the control of this court. I think that that power extends absolutely to the control and direction of the plaintiff in this cause, the Equitable Trust Company, as to not only the action which it has brought in New York but any other action which it might see fit to ask to bring.”

And again the Court said, making the following order:

“I am entirely without hesitation to the extent that I have indicated, that this court has jurisdiction of the plaintiff in that suit, and in the suit pending here, that is, the Equitable Trust Company, and that it can so exercise that jurisdiction as to require it to show cause here upon a given day. That will enable it to fully place before this court the whole subject matter as to its rights in the premises.

“I will direct the attorney for the Receivers now to prepare an order along the general lines suggested here, and with proper recitals, directing the Equitable Trust Company, the trustee, to show cause here upon a given day why the action which has been brought in that district should not be dismissed or its further prosecution by the trustee

stayed until the further order of the court; and also that until that return day and a determination of the matter the trust company be restrained from taking any further step of any nature in that action. That will be the general nature of the order. I will sign such an order. And in order that responsibility may not be laid entirely upon Mr. How the order may be served upon Mr. How as the solicitor for the plaintiff in this district, but I would advise that the order be served immediately upon the Equitable Trust Company in New York."

On the hearing of the order to show cause the Court, speaking to Mr. Partridge, said:

"THE COURT—I do not understand your suggestion as to the diversity of view between the Receivers. There cannot be any desire or wish on the part of the Receivers as to how the litigation shall go."

We have taken the liberty of quoting the foregoing extracts from the proceedings of the lower court for the purpose of demonstrating that nothing has been omitted from the record in this case, and that there is no basis for any claim that the order to show cause and the subsequent restraining order were made at the instance of the Receivers.

The contention that the proceeding was a proceeding in contempt as distinguished from the proceeding for an injunction arises from confusion. There is nothing in the record to show or indicate that the order, which on its face purports to be an injunction, was anything but an injunction.

The following extracts from the proceedings in the lower court at the hearing of the order to show cause show the attitude assumed by the Court on this question:

"MR. BOWIE—It seems to me that the one question which this court is considering at the present time is, was the Equitable Trust Company in contempt when it filed this bill in New York?

"THE COURT—Oh, no, not whether it was in contempt, that is, I mean in any sinister way.

"MR. BOWIE—I mean in contempt so as to authorize that further proceedings be enjoined.

"THE COURT—Was it justified in bringing the proceeding?

"MR. BOWIE—In other words, was it bringing a proceeding which legally could not be brought without the sanction of this court?

"THE COURT—That is putting it in another way. Was it authorized in bringing that action and prosecuting it without the direction of this court; *if it was not authorized it can be restrained from prosecuting that action, it can be required to dismiss it.*"

In other words, the proceeding is to restrain a suit commenced without authority. This is the character of the proceeding as fixed by the lower court.

"MR. PARTRIDGE—Now, surely, if your Honor please, the question as to whether or not the Receiver was the proper party to bring the suit was before this court; in other words, even if it be conceded that the Receiver had no right to bring a suit under Contract B still the Receivers had submitted to this court the question as to whether or not they had a right to bring that suit

and certainly any action in another jurisdiction which sought to foreclose that question was an interference with a matter that was brought before the court by its receivers.

"THE COURT—It is merely the corollary of the proposition that before bringing that suit it was the duty of the trustee to submit the question to this court for its direction."

The fact of the matter was that in this proceeding the Court was on its own motion asserting power to control the parties before it in collateral proceedings. The attitude of the Court being that expressed in the statement made on June 10th, the day before the order to show cause was written, when the Court declared:

"THE COURT— . . . In brief, my mind is firmly of this conviction: I cannot for a moment entertain the proposition that this court is so helpless in the administration of a great property of this kind under the bill that has been filed here as that it cannot *control the action of any party connected with the suit, either directly or indirectly, with reference to litigation which involves the property or any of the subsidiary interests which are within the control of this court.* I think that that power extends absolutely to the control and direction of the plaintiff in this cause, the Equitable Trust Company, as to not only the action which it has brought in New York but any other action which it might see fit to bring."

This proceeding was not a proceeding for contempt, though certain of the arguments advanced in favor of the jurisdiction of the Court to enjoin the

prosecution of the New York bill, viz., the argument that the subject-matter with which that bill dealt was in the possession of the Receivers would, had the same been asserted and upheld, have formed the basis of a contempt proceeding. The Court, however, did not see fit to bring a proceeding to punish for a contempt committed, but intend to assume direction and control over the future action of the Trustee, through injunctive process. Thus: the injunction itself, issued on the order to show cause, not only restrains the prosecution of the New York Bill, *but restrains the Trustee from doing any act which may in anywise affect or impair the obligations of Contract B or any of its provisions without first procuring the sanction of the Court.* IN OTHER WORDS, THE TRUSTEE IS RESTRAINED NOT ONLY FROM SUING IN NEW YORK, BUT ALSO FROM TERMINATING ALL PROVISIONS OF CONTRACT B, SAVE AND EXCEPTING THE PROVISIONS OF SURETYSHIP, THOUGH THE TRUSTEE IS BY THE TERMS OF HIS TRUST REQUIRED TO TERMINATE THESE PROVISIONS SHOULD TWO-THIRDS OF THE BONDHOLDERS ELECT SO TO DO AND NOTIFY IT OF THEIR ELECTION.

The claim that the order in question is an order punishing for contempt assumes that the injunction embodied in the order appointing the Receivers was sufficiently broad, either by express terms or by necessary implication, to prohibit the commencement of the suit in New York. Admittedly this is not the

fact, unless the suit in New York interfered with the property in the possession of the Receiver. If petitioners be correct—and no substantial argument is advanced to the contrary—the commencement of the suit in New York did not constitute an interference with the possession of the Receivers, and although the lower court was of a different opinion, it did not propose to rest its order on any such basis. *The lower court claimed the right to control the future conduct of the Trustee as well as the right to protect property in the possession of the Receiver. Accordingly, instead of making an order in the nature of a contempt order, it ignored the past, did not direct the Trustee to dismiss the bill, and made an order enjoining the Trustee from further prosecuting the suit in New York or taking any steps whatever under Contract B without the consent of the Court.* This order, if violated, would form the basis of a proceeding in contempt. It is admittedly broader in scope than the injunction contained in the order appointing Receivers and is, therefore, itself an injunction, not a contempt proceeding. Injunction is the proper and appropriate remedy by which to control the future conduct of a party and protect the jurisdiction of the Court from interference through the initiation of suits in other jurisdictions (See *Guardian Trust Co. v. Kansas*, 146 Fed., 340). Such injunctions are usually sought through the filing of a dependent bill, but here the Court, acting on its own

motion, bases the order on its order to show cause why such injunction should not issue.

COMMENTS ON CERTAIN AUTHORITIES CITED BY
RESPONDENT.

The case of *Lowe v. Blackburn* (87 Fed., 392), is cited as authority for the proposition that the Court in foreclosing the mortgage is at liberty to disregard the provisions of the mortgage and to conduct the foreclosure proceeding as it may see fit. This case does not lay down any such principle of law. It merely holds that the provisions of a mortgage governing the manner in which a sale of the mortgaged property shall be made by the trustee, are not binding upon the Court when a judicial sale takes place. It is, of course, true that the parties cannot by contract deprive the Court of the powers ordinarily incident to it in judicial proceedings, nor can they prescribe the mode in which a Court shall conduct a judicial sale.

The contention that when a court has taken possession of property by receiver it thereupon becomes enabled to require any controversy it may desire to be submitted to it, is utterly without support or authority. On the contrary, the settled rules of law apply to proceedings in which receivers are appointed as well as all other proceedings, the only exception being that claims to property in the possession of the receivers or to the possession of which the re-

ceivers are entitled must be litigated before the tribunal appointing the receivers. This, however, does not mean that the Court can require the parties to the action in which the receivers are appointed to litigate questions which they do not desire to litigate, and which do not involve title or right of possession to the property in the hands of the receivers.

The case of *Newton v. Gage* (155 Fed., 598), expressly recognizes this settled rule of law.

The case of *Mercantile Trust Company v. Atlantic and Pacific* (70 Fed., 518), merely declares that when property is in the possession of the receiver of the court the Court will not authorize action to foreclose a prior mortgage to be brought in another jurisdiction, but to require that such action be brought by cross-bill. The rule is, of course, eminently proper.

In closing, we desire to call the attention of the Court to the decisions of the Supreme Court of Michigan, a State in which a mortgagee is by statute given the express right to join the guarantor in an action of foreclosure. In *Vaughan v. Black and others*, the Supreme Court of Michigan said:

" . . . It has been settled by repeated decisions of this court that it is not within the power of courts of chancery to grant absolute personal decrees against parties claimed to be collaterally liable for the mortgage debt in the original decree, and, if done, the decree is so far nugatory. The remedy is purely statutory, and

cannot be invoked until after a balance is reported unsatisfied . . .”

Vaughan v. Black et al., 29 N. W. Rep., 523-4.

See also:

Windsor v. Ludington, 43 N. W. Rep., 867.

Respectfully submitted.

Attorneys for Equitable Trust Company
of New York.

Amici Curiae.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

EX PARTE THE EQUITABLE TRUST COM-
PANY OF NEW YORK—ORIGINAL NO. 169.

IN THE MATTER OF THE PETITION OF THE
EQUITABLE TRUST COMPANY OF NEW
YORK, AS TRUSTEE, FOR A WRIT OF MAN-
DAMUS—ORIGINAL NO. 2757.

IN THE MATTER OF THE APPEAL OF THE
EQUITABLE TRUST COMPANY FROM THE
ORDER ISSUING THE INJUNCTION, DATED
FEBRUARY 21, 1916.

**REPLY TO BRIEF OF SAVINGS UNION BANK
AND TRUST COMPANY.**

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JOHN F. BOWIE,
Amici Curiae.

Filed this.....day of March, 1916.

F. D. MONCKTON, Clerk.

By....., Deputy.



IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

Ex parte The Equitable Trust Company
of New York, Original No. 169.

In the Matter of the Petition of The
Equitable Trust Company of New York,
as Trustee, for a Writ of Mandamus,
Original No. 2757.

In the Matter of the Appeal of The
Equitable Trust Company from the
Order Issuing the Injunction, dated
February 21, 1916.

REPLY TO BRIEF OF SAVINGS UNION BANK AND
TRUST COMPANY.

In the briefs heretofore filed but incidental attention has been paid to the petition for intervention of the Savings Union Bank and Trust Company. On March 27th a brief was filed in support of that petition, and as the statements contained in this brief might lead to confusion, we will reply thereto by stating the facts shown by the record.

At the time the motion for entry of decree was made in the lower court, no petition for intervention had been presented by the Savings Union. On the afternoon of March 6th, the hearing of the motion for decree having been continued from morning till afternoon, the Savings Union asked leave to intervene for the sole purpose of being heard on the question of the *up-set price*. The Savings Union asked that an up-set price of \$40,000,000 should be fixed. This petition was never heard, and on March 13th a petition for intervention, accompanied by a bill in all respects similar to that presented with the petition for intervention filed here, was presented in the lower court. Time to answer this petition filed in the lower court has not as yet expired.

On the hearing of the proceedings on mandamus and prohibition a petition for intervention was filed in this Court.

As the questions presented to this Court related to the validity of the proceedings in the lower court taken at a time prior to the presentation of such petition, it is apparent that the petition has no legal relevancy to the proceedings pending in this Court. It is in fact a mere attempt to afford a basis on which orders made before its presentation may rest, an attempt to create a record justifying judicial action after that action had taken place. This, of course, cannot be done, but were it otherwise, the petition for intervention does not afford such a basis. The claim of the intervenor is:

(a) That the obligation of the Denver Company to make the payments of interest and sinking fund required by Contract B is secured by an equitable charge on the properties of the Denver Company.

(b) That this equitable charge is prior to the liens created by the Adjustment and Refunding Mortgages of the Denver Company.

(c) That three Banking houses in New York, each of whom has a representative on the Reorganization Committee, are interested in the Adjustment and Refunding bonds of the Denver Road, and do not desire to see these bonds declared subordinate to the equitable charge arising from Contract B.

(d) That it is the intention of the Reorganization Committee to deprive the non-assenting bondholders of their rights under Contract B.

(e) That the Bankers interested in the Adjustment and Refunding bonds dominate the Reorganization Committee and the Trustee.

For these reasons the intervenor asks leave to intervene, in the foreclosure suit and therein to sue the Denver Company and the trustees of the Adjustment and Refunding bonds, to foreclose the equitable charge created by Contract B, and establish its priority over the Adjustment and Refunding Mortgages.

The verification of the Complaint in Intervention is in the following form:

United States of America,
Northern District of California—ss.

JOHN S. DRUM, being duly sworn, deposes and says: That he is an officer, to wit, the President, of SAVINGS UNION BANK AND TRUST COMPANY, the intervenor named in the foregoing complaint of intervention, and knows the contents thereof; that he is credibly informed with respect to the truth of all of the facts set forth in said complaint and believes the same to be true.

JOHN S. DRUM.

Such a verification is wholly insufficient as an affidavit, and affords no proof of the charges made.

Clark v. Nat. Linseed Oil Co., 105 Fed., 792.

But even if the bill were properly verified, the record in the case shows that the charges of fraud are made in willful disregard of the facts disclosed by the record.

CONTRACT B.

The entire complaint in intervention is based on the theory that Contract B creates an equitable charge on the properties of the Denver Company, superior to the Adjustment and Refunding Mortgages.

Even if this claim be not well founded still the Reorganization Committee and the Trustee intend to assert this very claim against the Denver Company, but do not intend to press any litigation involving this claim to decree, until after foreclosure of the

Mortgage on the properties of the Western Pacific.

Does this difference in point of view as to the time at which this claim is to be asserted form any basis for inferring fraud, or permitting intervention in the foreclosure suit, even if such inference be indulged?

As under the proposed Plan of Reorganization not one dollar of money or property goes to any person other than the holder of a First Mortgage bond, and as indebtedness of \$55,000,000 subordinate to the lien of the First Mortgage is wiped out and accorded no recognition, though the Denver Company is the person to whom this debt is owed, there is no room for any charge of fraud connected with the pending proceeding. Accordingly, the right of intervention is claimed on account of a fraud which the intervenor is credibly informed the Trustee intends to perpetrate hereafter in a different proceeding.

Obviously the intervention is sought in the wrong proceeding.

But apart from this the entire claim is founded upon a distortion of facts.

THE QUESTION OF EQUITABLE CHARGE.

As stated in the petitioner's brief, the right to realize upon the property mortgaged cannot be suspended because the interest on the mortgage may be guaranteed, and the guaranty of the interest may be secured by an equitable charge. As, however, so much has been said upon the question of the equitable charge,

and as inferences of fraud are drawn from the fact that proceedings to realize upon the guaranty of interest have been delayed, we will state in some detail the actual facts and considerations which moved the Reorganization Committee to delay proceedings under Contract B till after foreclosure and sale of the properties of the Western Pacific.

In a contract entered into between the Denver & Rio Grande Railroads and the Western Pacific Railway on the 22nd day of June, 1905, the Denver Companies agreed to enter into three contracts with the Western Pacific. One was Contract A. The covenant in the agreement of June 22nd, pursuant to which Contract A was executed, provided that under Contract A the Denver Companies should agree to purchase Second Mortgage bonds of the Western Pacific in such amount as might be required, after the application of the proceeds of the First Mortgage bonds, to complete the acquisition, construction and equipment of the main line of the Western Pacific Company from Salt Lake City to San Francisco, with adequate terminals and other property necessary for use in connection with said main line.

The second was Contract B. This agreement has been much discussed, and the covenant contained in the contract of June 22, 1905, pursuant to which Contract B was executed, provided that under Contract B the Denver Company should loan to the Western Pacific Company, upon its unsecured prom-

issory notes, moneys sufficient, after application of the proper available income of the Western Pacific Company, to provide operating expenses, taxes and interest on its First Mortgage and sinking fund. This provision also require that Contract B should obligate the Denver Company to pay directly to the Trustee moneys sufficient to pay interest and sinking fund.

Pursuant to this contract of June 22, 1905, Contracts A and B were executed, these contracts being executed on the same day, to wit, June 23, 1905.

By Contract A the Denver Company obligated itself to purchase Second Mortgage bonds of the Western Pacific Company to such extent as might be necessary to complete the Western Pacific, after there had been applied to construction the proceeds of the First Mortgage issue. It was clearly contemplated by this contract that the Denver Company might be called upon to lay out \$18,750,000 in this manner. As an actual matter of fact, the Denver Company was called upon to lay out, in the completion of the construction of the Western Pacific, approximately \$33,000,000.

On the same day Contract B was executed. The following facts should be noted:

1. Contract B was never recorded.
2. Contract B did not purport to create a legal charge upon the property of the Denver Company, or a mortgage on the income of the Denver Company.

It did purport to provide against alienation by the Denver Company of its properties under any circumstances, unless the purchaser acquiring the properties of the Denver Company on such alienation taking place should assume the burdens and obligations of Contract B.

No question has arisen, or can ever arise, concerning the liability of the Denver Company under Contract B, but the very moment that it is asserted that Contract B creates a charge prior to the Adjustment and Refunding Mortgages of the Denver Company, controversies of the most bitter character immediately arise. Whatever the result of such controversies may be, it will be contended, that inasmuch as the Denver Company, then owing \$80,000,000, undertook on the same day on which it entered into Contract B to supply the funds necessary to complete the Western Pacific, clearly it could not have been intended that Contract B should create a charge upon the properties of the Denver Company which would prevent that road from raising by mortgage the moneys essential to the performance of Contract A.

Again, it will be contended that the reference to Contract B contained in the Adjustment and Refunding Mortgages are not sufficient to put the purchasers of bonds on notice that Contract B actually created an equitable charge. Again, questions will arise concerning the validity of the provision declaring that the Contract should run with the respective railways, for only certain types of covenant run with the land,

and it has not yet been determined that covenants of the class herein mentioned fall within the character of covenants which may lawfully run with the land.

It is obvious that questions of this class, involving millions of dollars, could not be finally adjudicated with rapidity, nor would any decree be accepted as final short of that of the Supreme Court of the United States.

The only action that could be brought under Contract B prior to the foreclosure and sale of the assets of the Western Pacific was an action by the Trustee to recover the interest then accrued. If such action were brought and the judgment paid, a new action would have to be brought for the next instalment, and if this procedure were followed, the Western Pacific Railroad would stay in possession of the Receivers for all eternity, and the Trustee would merely continue to sue upon the guaranty for payment of interest. As, however, the Denver Company owes between \$123,000,000 and \$124,000,000, and as its income was not sufficient to pay the interest on its own debt and the interest on the First Mortgage of the Western Pacific, and as a bond issue of the Denver Company in the principal amount of \$10,000,000 was in default, though the default did not arise from the failure to pay interest, it would, in the opinion of any reasonable man, be perfectly obvious that a decree against the Denver Company, whether that

decree established Contract B as a charge prior to the Adjustment and Refunding bonds, or as a charge subsequent to those bonds, could result in nothing but receivership of the Denver Company. It is also quite obvious to any one knowing the condition of the Denver Company that such receivership would stop the payment of interest on bond issues of the Denver Company prior to that of the Refunding Mortgages.

Under these circumstances, the only sensible course to pursue was to foreclose the Western Pacific mortgage and proceed against the Denver Company, not merely for the specific performance of its contract to pay interest, *but for a judgment in a capital sum equal to the damage sustained by the Western Pacific bondholders through the breach of the obligation of the Denver Company to pay interest. Such a judgment could only be obtained after the Western Pacific properties had been sold on foreclosure, and the amount of the deficiency ascertained.* If, after the rendition of such a judgment, the Denver Company went into receivership, this judgment, which it was estimated would amount to between \$20,000,000 and \$30,000,000, would become one of the principal claims against the Denver Company, if prior to the Refunding bonds that priority could be established. If subsequent to the Adjustment and Refunding bonds, still it came ahead of all of the stock of the road,

and was a claim of large amount and real value, provided there existed in the hands of the holder sufficient funds to protect the claim on reorganization. Such funds were provided by the Reorganization Plan of the Western Pacific road through the underwriting of bonds to be issued by the new corporation.

We respectfully submit that it cannot honestly be said that the failure to assert the claim against the Denver Company on Contract B, and to reduce that claim to judgment prior to foreclosure and decree, is fraud. On the contrary, any other procedure would be willful and deliberate sacrifice of the rights of the holders of bonds of the Western Pacific Company under the guaranty contained in Contract B. Yet, such is the claim of fraud upon which the petition for intervention is filed.

The obvious propriety of the course adopted of itself completely refutes the charges of fraud, which are made either in complete ignorance, or through malice.

The claim that the Plan of Reorganization contemplates depriving non-assenting bondholders of their rights under Contract B is absurd. The holder of a single bond has the right to insist that an action be brought to enforce that Contract. The provision of the Plan restricting the right of benefit to those joining therein refers only to benefits derived under the

Plan, and does not purport to destroy the right of non-assenting bondholders.

Respectfully submitted,

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F. W. M. CUTCHEON,
JOHN F. BOWIE,

Amici Curiae.

No. ———

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

IN THE MATTER OF THE PETITION OF
THE EQUITABLE TRUST COMPANY OF
NEW YORK, AS TRUSTEE, FOR A WRIT
OF MANDAMUS, TO BE ISSUED AND
DIRECTED TO THE HONORABLE WIL-
LIAM C. VAN FLEET, JUDGE OF THE
UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALI-
FORNIA, SECOND DIVISION.

BRIEF OF AMICI CURIAE.

BYRNE & CUTCHEON,
24 Broad Street, New York,
CHARLES S. WHEELER and
JOHN F. BOWIE,
14 Montgomery Street, San Francisco,
Amici Curiae.



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BRIEF OF AMICI CURIAE.

The facts upon which this proceeding arises are set forth in the brief filed by counsel for the Equitable Trust Company, and, therefore, are not recapitulated. The controversy turns on the interpretation of Section 21 of the Judicial Code, and we desire to place before the Court the full legislative history of that section of the Code, as well as the decisions of the State courts dealing with State statutes enacted in pursuance of the rules of policy of which Section 21 is an expression.

Section 21 of the Code provides:

"Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge

before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

The statute was, at the time of its enactment, new to Federal procedure, though legislation had been enacted in various States of the Union similar in purpose. The Judicial Code was adopted in 1911, and became operative in 1912. While the language of Section 21 is clear, it is but proper to interpret the act in the light of the history of the time at which it was passed (*U. S. v. R. R.*, 157 Fed., 618), and, though we are not at liberty to recur to the views of individual Members of Congress expressed in debate, we may look to the proceeding in Congress, for "*the statements of those who had charge of the law*

"made to the legislative body passing it, as to its meaning and purpose are always competent."

Ex parte Farley, 40 Fed., 69;

Johnson v. Southern Pacific, 196 U. S., 19, 20.

LEGISLATIVE HISTORY OF SECTION 21.

When the Judicial Code was reported to the House of Representatives, Section 20 was the only provision embodied in the Code which dealt with the question of the disqualification of judges.

This section was a revision of Sec. 601 R. S., and the form of the statute as reported by the Committee is the same as that in which it now exists. That section being then and now as follows:

"Sec. 20. Whenever it appears that the judge of any district court is in any way concerned in interest in any suit pending therein, or has been of counsel or is a material witness for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; and also an order that an authenticated copy thereof shall be forthwith certified to the senior circuit judge for said circuit then present in the circuit; and thereupon such proceedings shall be had as are provided in section fourteen."

On December 14, 1910, when the House of Representatives, in Committee of the Whole, was considering the provisions of the Code, Mr. Cullop, of Indiana, suggested that the provisions relating to the

disqualification of judges should be amended so that bias or prejudice should constitute a ground of disqualification, and he further stated that the determination of the question of disqualification should not rest in the hands of the judge whose qualification was disputed. At the close of the discussion Mr. Cullop said:

"I am going to ask permission to add an amendment defining the causes and conditions under which a change of venue shall be granted, and so as to bring that question before the House I am going to ask unanimous consent to have time in which to prepare a provision covering that subject and present it to the House. *I can conceive no greater wrong imposed upon a citizen, however high or humble, than to compel him to submit his cause, an important matter to him, to a court in which he fears justice will not be administered to him. I can conceive of no greater imposition upon any court than to require it to sit, hear, and decide a cause in which it is aware the party litigants have not absolute confidence in his ability or qualification to dispose of it fairly.*

THE SPEAKER pro tempore—The gentleman from Indiana asks unanimous consent to pass for the present the pending section, which is section 20. Is there objection?

There was no objection."

Congressional Record, Vol. 46, Part 1, page 306, col. 2.

Pursuant to the consent thus given, Mr. Cullop reported his proposed amendment, viz:—Section 21 of the Code.

The amendment originally reported in the House as Section 20a, proposed by Mr. Cullop, read as follows:

"Sec. 20a. Whenever a party to any action or proceeding, civil or criminal, shall file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall set forth reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the time set for the trial or hearing of the case, or good cause be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit."

Congressional Record, Vol. 46, Part 3, page 2626, col. 2.

In presenting the amendment to the House, sitting as a Committee of the Whole, Mr. Cullop said:

"The section that is proposed as section 20a provides that, on the litigant filing the proper affidavit stating the fact that the judge is biased or prejudiced in the case, he shall proceed no further and another judge shall be called, under the provisions of the act, as provided in other cases, who shall hear and determine the case. The affidavit shall state the reasons for the belief that the applicant has for the bias or prejudice of the judge."

Congressional Record, Vol. 46, Part 3, page 2626, col. 2.

In the following colloquy between Mr. Cullop and other Members of the House, Mr. Cullop made clear the purpose of the amendment:

"MR. COX of Indiana—I am partly in favor of the gentleman's amendment, but does he believe that his amendment

will accomplish what he is driving at? In other words, *if the amendment is adopted, does the gentleman believe that it will leave it discretionary with the Court?*

MR. CULLOP—*No; it provides that the judge shall proceed no further with the case. The filing of the affidavit deprives him of further jurisdiction in the case.*

MR. COX of Indiana—But the gentleman says in his amendment that every affidavit shall set forth the reasons why. These are mental reasons and exist in the mind of the individual who files the affidavit. *Suppose the affidavit sets out certain reasons which may exist in the mind of the party making the affidavit; suppose the judge to whom the affidavit is submitted says that it is not a statutory reason? In other words, does it not leave it to the discretion of the judge?*

MR. CULLOP—*No; it expressly provides that the judge shall proceed no further. If this affidavit is to be reviewed, it would be by the judge who is called in to succeed him. It does not say that he shall state the facts, but the reasons for the belief that he has that the judge is biased or prejudiced in the case.*

Now, this amendment is very essential, in my judgment, for the protection of the courts from criticism. As the matter now stands, a litigant in court has no recourse for relief from the trial judge, but he must submit his case, sometimes feeling, as he may, that the judge is biased and prejudiced and not qualified to sit in the case, but he has no relief whatever. That has provoked, and will continue to provoke as long as the law stands as now, criticism on the court; some of it may be just, some of it may be unjust.

This amendment seeks to remove from the court that criticism, that parties may have relief from judges in whom they have not confidence in their impartiality and freedom from prejudice, so that others may be called to hear and determine the case and avoid the criticism that now exists on the part of litigants in courts in many instances."

In discussing the time at which the affidavit should be filed, it was said:

“MR. BENNET of New York—If in ten days before the date when the case is to be called for trial he files his affidavit, the judge has to go off the bench. If he does not file it prior to that ten days and files it two days before the trial, who is to say whether it is good cause shown or not? The very judge whom he wants to get off the bench because he thinks he is prejudiced?

MR. CULLOP—He must state in his affidavit that the reason for the change was unknown to him before the time that he files it.

MR. BENNET of New York—That is true, but who is to construe the language “for good cause shown”? Suppose the judge says it is not a good cause.

MR. CULLOP—That judge cannot pass upon that question. What judge could say that it was not good cause when a man said he did not know of the existence of the cause before the time he filed his affidavit?

MR. BENNET of New York—Why put the language in at all? Whenever you put language in like that it is open to construction. You make it discretionary, and discretionary to whom? To the very judge whom you want to take off the bench.

MR. CULLOP—*Then if the judge hesitated upon that, it would be the amplest and best reason in the world why he should be considered as not qualified to sit. Nothing could show the disqualification of a judge more than his action in passing upon some question of that kind in order to hold jurisdiction of a suit. His sense of duty would require him to refuse to pass on it.*

MR. BENNET of New York—The gentleman may be quite correct with relation to the abstract proposition, but I assume that what he is aiming at is to give a man an absolute right to take off the bench a judge whom he does not think qualified to try his particular case.

MR. CULLOP—But when he states that he did not know

the existence of the cause sooner, that settles it. That is done, then. There is no review of that cause. That man alone is the arbiter of that question."

Congressional Record, Vol. 46, Part 3, pages 2628, 2629

Viewing the various clauses of the statute in the light of the purpose of the law as declared to Congress by those proposing its enactment, the correct interpretation of the act is made manifest.

The clause of the section requiring the affidavit to state the reasons for the belief that has existed, was not intended to present any judicial question. Concerning this clause the following explanation was given:

MR. MANN—What is the purpose that the gentleman has in mind in requiring that the affidavit shall state the reason?

MR. CULLOP—The reason for the belief that he entertains?

MR. MANN—What is the reason for putting that in, I mean?

MR. CULLOP—I have done that at the suggestion of the committee. It was not my own purpose to do that.

MR. MANN—That is what I wanted to get at.

MR. CULLOP—*It was the suggestion of the committee, that it might correct any abuses that might grow up under this provision.*

MR. MANN—It has been suggested here by members that, under this amendment offered by the gentleman, the judge would have a discretion in passing upon the matter, and he would have the right to examine and ascertain whether the reasons were sufficient. Now, that is plainly not the purpose of the gentleman from Indiana. Is there any reason why it should be left in uncertainty?

MR. BENNET of New York—Not at all.

MR. MANN—When you undertake to say that a man shall file an affidavit of prejudice, and give the reason for his prejudice, is there not some question as to whether that does not permit the judge to pass upon the reasons? Otherwise, what is the object of giving the reason?

MR. CULLOP—No; because the very provision of the statute is that he shall proceed no further. I have no objection to the amendment, but—"

Congressional Record, Vol. 46, Part 3, page 2629.

In reply to some remarks by Mr. Mann, in which that gentleman expressed some fear that the absolute rights given by the amendment might be abused by unscrupulous litigants, Mr. Cullop said:

"None of the numerous objections that the gentleman from Illinois makes are found by experience to exist in the places where this statute has been in use. They are only surmises of the gentleman. There would be no more delay under this statute, or even as much delay, as there is now under the present statute. The present statute is the very reason why parties in suits file applications for continuances and put off the day of trial. Under the present law an unscrupulous litigant can obtain a continuance without any trouble and defer the day of trial. This would be a means to prevent continuances and to expedite the business of the court instead of delaying it, because the man who felt himself dissatisfied with the judge could file his application and be relieved from the jurisdiction of that judge. As it is now, he is driven to file an affidavit for continuance, hoping that perhaps Providence will grant him a change of venue and give him that which the law of his country does not afford, a fair judge before whom to try his case. This will afford him facilities to get another judge, and there will be no trouble, as experience has taught, in procuring another judge to sit in the cause and try the case. I hope the amendment will be adopted."

Congressional Record, Vol. 46, Part 3, page 2629.

After the discussion above set forth, Section 20a was adopted by the House, the form of the section so adopted being as follows:

"Sec. 20a. Whenever a party or his counsel to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice, either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, and another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed by section twenty-three, to hear such matter. Every affidavit shall state the reason for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit."

Congressional Record, Vol. 46, Part 3, page 2630, col. 1.

In the conference between the representatives of the House and Senate, two amendments were made in Section 20a. The suggested Senate amendments were as follows:

"Section 21. On page 10, in line 13, strike out the words 'or his counsel.' In line 22, before the word 'reason' insert the words *facts and the*. In line 22, after the word 'cause' insert the word *shall*. On page 11, line 2, after the word 'affidavit' insert the words *and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith.*"

See Conference Report, 61st Congress, 3rd Sess., Doc. No. 848.

The Conference Report submitted by Mr. Moon to

the House, was accompanied by a Statement of the specific changes in matters of substance, made for the purpose of directing attention to all changes of importance. This Statement was read in lieu of the Conference Report (see Cong. Rec., Vol. 46, Part 4, p. 3998), and refers to Section 21 (Section 20a), and mentions as the material change in that section only the provision requiring that the affidavit be accompanied by the certificate of counsel. The change requiring the affidavit to state the facts, as well as the reasons for the belief of the affiant, was not regarded as of sufficient importance to justify a reference thereto (Cong. Rec., Vol. 46, Part 4, p. 4001).

The legislative history of Section 21, and the objects of enacting that statute, as shown by the statements to Congress of those proposing the enactment of the law, demonstrate that the statute was designed to protect litigants from being compelled to submit their cause to a judge whom the litigant believed to be biased. It also appears that there was no intention of permitting the judge whose qualification was challenged to pass upon the question of his own qualification. The very first clauses of the statute declare:

"Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter."

And, as pointed out by Mr. Cullop:

"MR. COX of Indiana—I am partly in favor of the gentleman's amendment, but does he believe that his amendment will accomplish what he is driving at? In other words, if the amendment is adopted, does the gentleman believe that it will leave it discretionary with the court?

MR. CULLOP—No; it provides that the judge shall proceed no further with the case. The filing of the affidavit deprives him of further jurisdiction in the case.

MR. COX of Indiana—But the gentleman says in his amendment that every affidavit shall set forth the reasons why. These are mental reasons and exist in the mind of the individual who files the affidavit. Suppose the affidavit sets out certain reasons which may exist in the mind of the party making the affidavit; suppose the judge to whom the affidavit is submitted says that it is not a statutory reason? In other words, does it not leave it to the discretion of the judge?

MR. CULLOP—No; it expressly provides that the judge shall proceed no further. If this affidavit is to be reviewed, it would be by the judge who is called in to succeed him."

Congressional Record, Vol. 46, Part 3, page 2626 (bottom), 2627 (top).

Indeed, it seems that the provisions of the statute requiring the reasons why the affiant believes bias to exist were designed to facilitate Congress to remedy abuses arising under the statute, if the same did in fact arise. This is shown by the following dialogue:

"MR. MANN—What is the purpose that the gentleman has in mind in requiring that the affidavit shall state the reason?

MR. CULLOP—The reason for the belief that he entertains?

MR. MANN—What is the reason for putting that in, I mean?

MR. CULLOP—I have done that at the suggestion of the committee. It was not my own purpose to do that.

MR. MANN—That is what I wanted to get at.

MR. CULLOP—It was the suggestion of the committee, that it might correct any abuses that might grow up under this provision.

MR. MANN—It has been suggested here by members that, under this amendment offered by the gentleman, the judge would have a discretion in passing upon the matter, and he would have the right to examine and ascertain whether the reasons were sufficient. Now, that is plainly not the purpose of the gentleman from Indiana. Is there any reason why it should be left in uncertainty?

MR. BENNET of New York—Not at all.

MR. MANN—When you undertake to say that a man shall file an affidavit of prejudice, and give the reason for his prejudice, is there not some question as to whether that does not permit the judge to pass upon the reason? Otherwise, what is the object of giving the reason?

MR. CULLOP—*No; because the very provision of the statute is that he shall proceed no further."*

Congressional Record, Vol. 46, Part 3, page 2629.

The requirement that the affidavit must be filed ten days before the commencement of the term, or good cause for the delay shown, was not intended to present a justiciable controversy to the judge whose bias was in question. This clearly appears from the discussion between Mr. Cullop and Mr. Bennet, wherein it was said:

"MR. BENNET of New York—Who is to construe the language 'for good cause shown'? Suppose the judge says it is not a good cause.

MR. CULLOP—That judge cannot pass upon that question. What judge could say that it was not good cause when a man said he did not know of the existence of the cause before the time he filed his affidavit?

MR. BENNET of New York—Why put the language in at all? Whenever you put language in like that it is open to construction. You make it discretionary, and discretionary to whom? To the very judge whom you want to take off the bench.

MR. CULLOP—Then, if the judge hesitated upon that, it would be the amplest and best reason in the world why he should be considered as not qualified to sit. Nothing could show the disqualification of a judge more than his action in passing upon some question of that kind in order to hold jurisdiction of a suit. His sense of duty would require him to refuse to pass on it.

MR. BENNET of New York—The gentleman may be quite correct with relation to the abstract proposition, but I assume that what he is aiming at is to give a man an absolute right to take off the bench a judge whom he does not think qualified to try his particular case.

MR. CULLOP—But when he states that he did not know the existence of the cause sooner, that settles it. That is done, then. There is no review of that cause. That man alone is the arbiter of that question."

Congressional Record, Vol. 46, page 2628, page 2629.

Indeed, the conditions prevailing in the country at the time Section 21 of the Code was enacted demonstrated the necessity of increasing, as far as possible, public confidence in the judiciary. At that time various States had proposed constitutional amendments subjecting the judicial branch of the government to recall. Lack of confidence, then widely prevailing among certain classes, threatened the independence of the judiciary, for many people then professed the belief that political liberty could only be assured by destroying the independence of the judiciary. Obviously, it was wise and desirable to enact legislation

calculated to strengthen the faith of the people in the judicial department, and to assure them that the independence of the judiciary might be preserved without danger to the political liberty of the individual. As pointed out by Montesquieu, "Political liberty of the subject is a tranquillity of mind arising from the opinion that each person has of his own safety. In order to have this liberty, it is requisite that the government be so constituted as one man needs not be afraid of another."

D'Alembert Edition, Vol. 1, p. 174.

To assure to the litigant a right to trial before a judge of whose integrity and fairness he had no doubt, was the primary object of the act. Indeed, it should be noted that the conference report in which the enactment of this statute was provided for, also limited in other respects the powers of judges sitting in courts of first instance. The act limiting the power of judges in the issuance of interlocutory decrees enjoining the enforcement of legislative acts was part of this same bill.

FEDERAL DECISIONS INTERPRETING SECTION 21.

Section 21 of the Code came before the United States Supreme Court in the case of *Ex parte American Steel Barrel Company*, 230 U. S., 35. The facts of that case were as follows: The Iron Clad Manufacturing Company was adjudicated a bankrupt on December 2, 1911, the creditors' petition having been filed May 23, 1911. Pending the adjudication of

bankruptcy, the creditors filed a petition charging that the assets of the Steel Barrel Company were in fact the property of the Iron Clad Company and praying an extension of the receivership. This application was bitterly contested. All these proceedings were held before Judge Chatfield, who, on March 15, 1912, refused to extend the receivership to the property of the Barrel Company. Counsel for the creditors requested that the entry of this order be stayed so as to permit them to make a new application. Such new application was made March 29, 1912, and at the same time they filed an affidavit under Section 21. To quote from the opinion:

"That affidavit, in substance, alleged that throughout the proceedings in the case, Judge Chatfield had manifested a strong bias and prejudice against the petitioning creditors and against their counsel, and has shown a strong bias toward Mrs. Elizabeth C. Seaman, who was and is the sole person interested in the subject-matter of the bankrupt corporation's property other than the creditors."

When the matter next came before Judge Chatfield, he made the following order:

"A certain affidavit by Thatcher M. Brown having been brought to the attention of the court, which affidavit was filed after the motion was referred to me by Judge Veeder and before any of the parties appeared before me, in which the said Thatcher M. Brown, as a party to the proceeding, makes an affidavit that I have a personal bias either against the creditors or in favor of the opposite party to the proceeding, and asking that another judge be designated in the manner prescribed in section 20, to hear this motion.

I do hereby, in accordance with the provisions of section

21 of the law known as the Judicial Code, and now in effect, proceed no further in this motion, and order that an authenticated copy of this statement be forthwith certified to the Hon. E. Henry Lacombe, Senior Circuit Judge now present in this Circuit, in order that proceedings may be had under section 14 of said act, it being apparent that this motion cannot proceed under section 23, which is prescribed as an alternative method in said section 21 of said law.

The court further certifies that it does not make an entry upon the records of the court (nor does it admit) that it has any personal bias or prejudice, but on the contrary might call in question many of the statements or controvert many of the allegations contained in said papers. And this court feels that if any disqualification exists it was also present when this court directed a verdict of adjudication and made other decisions in favor of said creditors, and when the judge now holding the court upheld the findings of the special commissioner as to charges of contempt against Mrs. Seaman.

The court, however, feels that the intent of section 21 is to cause a transfer of the case, without reference to the merits of the charge of bias, and therefore does so immediately, in order that the application of the creditors may be considered as speedily as possible by such judge as may be designated."

Thereafter, the affidavit having come before Judge Lacombe, he appointed Judge Mayer to try the cause.

The Steel Barrel Company thereafter petitioned the Supreme Court for a writ of mandamus, directing Judge Chatfield to proceed to decide the cause, a cause which he had heard, on which he had reached and expressed a conclusion, which was not embodied in a judgment only because the affidavit had been filed. The decision of the Supreme Court is contained in the following extract from the opinion:

"Judge Lacombe was clearly called upon to determine in the exercise of his jurisdiction as the Senior Circuit Judge whether the situation was one in which he should designate a judge in the room and place of Judge Chatfield. He determined the matter adversely to the petitioners. If in this he made a mistake, it was one made in the course of the exercise of his legitimate jurisdiction under section 14 of the new Judicial Code, and we cannot compel him through a writ of mandamus to undo what has thus been done. *Ex parte Burtis*, 103 U. S., 238; *In re Parsons*, 150 U. S., 150."

The petitioners contended that Section 21 violated the provisions of the Constitution, and the decision of the Supreme Court necessarily negatives that claim. This is the extent to which the decision in this case goes: It holds that the act of the Senior Circuit Judge in designating a new judge, after there has been presented to him an affidavit purporting to comply with Section 21, is a judicial act. If this be true, the Senior Circuit Judge must, of necessity, be vested with jurisdiction to pass on the sufficiency of the affidavit. The opinion, however, contains several dicta. It is said:

"The basis of the disqualification is that 'personal bias or prejudice' exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the

pending cause. Neither was it intended to paralyze the action of a judge who has heard the case, or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard. This is the plain meaning of the requirement that the affidavit shall be filed not less than ten days before the beginning of the term."

Much that is here stated is obviously true, but the history of the statute shows that the right of the litigant was not to be restricted by the courts because the facts and reasons set forth in the affidavit did not, in the opinion of a judge, form sufficient basis for the conclusion at which the litigant had arrived. This matter, however, is not here material.

In the opinion it is also said:

"We shall not pass upon the timeliness of the affidavit, nor upon the legal sufficiency of the facts therein stated, as affording ground for the averment that 'personal bias or prejudice' existed. If Judge Chatfield had ruled that the affidavit had not been filed in time, or that it did not otherwise conform to the requirement of the statute, and had proceeded with the case, his action might have been excepted to and assigned as error when the case finally came under the reviewing power of an appellate tribunal. *Henry v. Speer*, 201 Fed. Rep., 869; *Ex parte Fairbank Co.*, 194 Fed. Rep., 978; *Ex parte Glasgow*, 195 Fed. Rep., 780, affirmed by this court in *Glasgow v. Moyer*, 225 U. S., 420."

This is undoubtedly true, but the rule announced affords no basis for the claim that the trial judge is called upon to determine the sufficiency of the excuse for delay in filing the affidavit, or to pass upon the sufficiency of the reasons for the belief that the judge

is prejudiced. Any error, whether it be jurisdictional or not, is susceptible of review on appeal.

The history of the act demonstrates, beyond doubt, that the jurisdiction of the judge of the trial court was confined to determining whether or not the affidavit filed purported to be in formal compliance with the provisions of Section 21.

Indeed, in *Henry v. Speer*, 201 Fed., 869, the Circuit Court of Appeals for the Fifth Circuit said:

"Upon the making and filing by a party of an affidavit under the provisions of section 21, of necessity there is imposed upon the judge the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and to determine its legal sufficiency. If he finds it to be legally sufficient, then he has no other or further duty to perform than that prescribed in section 20 of the Judicial Code. He is relieved from the delicate and trying duty of deciding upon the question of his own disqualification."

Glasgow v. Moyer, 225 U. S., 420, was a proceeding on *habeas corpus*. In that case the petitioner, after conviction by a jury, and pending the hearing of a motion in arrest of judgment, filed an affidavit. The Court, nevertheless, pronounced sentence. This he sought to review by *habeas corpus*. The Court held the proper remedy was appeal, saying:

"The writ of habeas corpus cannot be made to perform the office of a writ of error." * * *

"The principle is not the less applicable because the law which was the foundation of the indictment and trial is asserted to be unconstitutional or uncertain in the descrip-

tion of the offense. Those questions, like others, the court is invested with jurisdiction to try if raised, and its decisions can be reviewed, like its decisions upon other questions, by writ of error. The principle of the cases is the simple one that if a court has jurisdiction of the case, the writ of habeas corpus cannot be employed to re-try the issues, whether of law, constitutional or other, or of fact.

We have already pointed out that appellant before his trial petitioned this court in habeas corpus, and that his petition was denied on the ground that his proper remedy was by writ of error after trial."

With the exception of the case of *Ex parte Fairbanks*, hereafter considered, the foregoing decisions are the only cases dealing with the interpretation of Section 21.

Many States have similar statutes, and, with few exceptions, the courts have held uniformly that the presentation of the affidavit in form required by statute operated to terminate the judicial power of the judge.

DECISIONS FROM STATES INTERPRETING STATUTES SIMILAR TO SECTION 21.

The Indiana statute, from which the Federal statute was derived, is as follows:

"The court or judge shall change the venue in any civil action upon the application of either party made on affidavit showing . . . bias, prejudice, or interest of the judge."

2 *Rev. Stat.* (1876), 116.

In *Fisk v. Turnpike Co.*, 54 Ind., 479 (1876), the Court said:

"It was the imperative duty of the court to grant the change of venue as prayed by appointing a proper time to hold the trial and calling another judge to try the case. The court had no discretion in the matter. . . . The affidavit was such a one as the affiant had a right to make, and having a right to make it, his motives were not to be impugned. Whatever a person has a right to do in open court according to law he must be allowed to do without having his motives questioned. The affidavit being sufficient, it was the duty of the judge to so adjudge, without taking any further steps in the case."

The following are some of many subsequent cases in Indiana holding that on the filing of such an affidavit the judge must grant the change:

Burkett v. Holman, 104 Ind., 6; 3 N. E., 406;
Woodsmall v. State, 181 Ind., 613; 105 N. E.,
 155 (1914), in which many of the earlier
 cases are reviewed.

In Wisconsin there exists a similar statute, and the rule is the same. *Rines v. Boyd*, 7 Wis., 155.

In Illinois the statute provides that the judge shall award a change of venue on application as therein provided, and requires that the application be verified by the affidavits of two reputable persons.

In *Donovan v. People*, 138 Ill., 602, 28 N. E., 964, the lower court refused to grant the change of venue on the ground of prejudice, notwithstanding the filing of the affidavit, the Court determining that one of the two persons who verified the affidavit was not a rep-

utable person. The Supreme Court reversed this judgment, saying:

"The question is thus presented whether or not an application of the defendant in a criminal case for a change of venue, on account of the prejudice of one or more of the judges of the court in which the case is pending, which conforms to all of the requirements of the statute, can be defeated by counter-affidavits. We think it very clear that this question must be answered in the negative. The petition and the accompanying affidavits comply with the statute and such affidavit purporting to be made by reputable persons, residents of the county, not of kin to the defendant, etc., the right to a change of venue is absolute. The statute nowhere provides for the filing of counter-affidavits in such cases as it does where the ground for the change of venue is the alleged prejudice of the inhabitants of the county. It may be readily seen why such affidavits are allowed in the latter case, but not in the former. In the one case, there being no objection to the impartiality of the judge, he can fairly pass upon the question as to the prejudice of the people on affidavits pro and con; but the question being, is the judge himself prejudiced, there is from the defendant's standpoint no impartial tribunal to weigh the evidence and determine that issue. It is doubtless true that a statutory right to a change of venue is liable to abuse, but that fact confers no power upon courts to limit or qualify the right."

In *Simpson v. Simpson*, 165 Ill. App., 515, the Court said:

"Where the application for change of venue is made on account of the prejudice of the trial judge, the statute gives no discretion, but such judge, if the petition is in proper form and duly verified, must grant the petition and allow the change of venue. After the petition is presented the judge named therein has no power to render any further

order therein, except such as may be made in connection with the one which allows the change of venue."

In Missouri the statute is somewhat similar to Section 21, and limits the right of the party to a single change of judges on the ground of prejudice. In that State it is held that

"Where the application for change is in due form, the judge has no discretion, but must order the cause removed."

State v. Dabbs, 95 S. W., 275.

In Minnesota a similar statute is in force, though there is no limitation on the number of changes which may be obtained. In *State v. Hoist*, 126 N. W., 1090, the Supreme Court of Minnesota said:

"The new law introduces an entirely new feature and its language is plain, direct and positive. It means that the legislature intended that the filing of an affidavit of prejudice with the judge not less than two days before the expiration of the time allowed to prepare for trial, operated of itself, without any other act on the part of either counsel or court, to incapacitate the judge from trying the same."

In North Dakota Section 5454 of the Revised Code, enacted in 1899, provides:

"When either party to a civil action pending in either of the District Courts of the state shall, after issue joined, and before the opening of any term at which the cause is to be tried, file an affidavit corroborated by the affidavit of his attorney in such cause and that of at least one other repu-

table person, stating that there is good reason to believe that such party cannot have a fair and impartial trial of said action by reason of the prejudice, bias or interest of the judge of the District Court in which the action is pending, the court shall proceed no further in the action, but shall forthwith request, arrange for and procure the judge of some other judicial district of the state to preside at said trial in the county of the judicial subdivision in which the action is pending."

In *Orcutt v. Conrad*, 87 N. W., 982, decided in 1901, the Court said:

"Whatever the fact may have been when abstractly considered, it is nevertheless true under the plain reading of the statute that the filing of the required affidavits operated to judicially establish the fact of the existence of bias or prejudice, or both, in the mind of the resident judge with respect to this case, and further operated to oust that judge of all authority to act judicially in this action after the affidavits were filed. The legislature has declared in terms that after the prescribed affidavits are filed 'The court shall proceed no further in the action, but shall forthwith request, arrange for and procure the judge of some other judicial district of the state to preside at said trial in the county of the judicial subdivision in which the action is pending.'

In this case it appears that the defendant has in all particulars complied with the terms of the statute which are obligatory upon her, and having done so it cannot be doubted that she has thereby entitled herself to the benefits of the enactment. . . . As to the single question involved in this case, we think the provisions of the statute are unambiguous and entirely decisive. The language of the law-maker is explicit. When affidavits of prejudice have been filed the mandate of the statute is 'that the court shall proceed no further in the action.' Disregarding this inhibition of the statute, the resident judge has in this case proceeded,

against objections seasonably interposed, to take cognizance of and herein determine an important question arising in the case."

In Oklahoma Section 538 of the Laws, as amended in 1895, provides:

"If it be shown to the court by the affidavit of the accused that he cannot have a fair and impartial trial by reason of the bias and prejudice of the presiding judge . . . a change of judge shall be ordered, and the clerk of the District Court shall immediately transmit to the Supreme Court of the territory a certified copy of the order."

In *Lincoln v. Territory*, 58 Pac., 730, the Supreme Court of Oklahoma construed this statute as being mandatory, and held that on the filing of the affidavit the judge was *ipso facto* disqualified from proceeding further. The Court, in its opinion, p. 732, said:

"Now in this case, under the section of the statutes in question, the only evidence of the facts stated in said affidavit is the affidavit itself, as no one would contend, it seems to us, that in such a case counter-affidavits could be filed or other evidence heard. Then when the affidavit is presented to the court it stands uncontradicted and the only means by which the court could dispute it would be to use his personal knowledge. This would practically make him a judge in his own case, as the allegation in the affidavit is that he, the presiding judge, is biased and prejudiced against the accused. The charge is made against him personally of bias and prejudice. Now would it be reasonable to say the identical person against whom such a charge was made would be a competent tribunal to try and decide that question? *To allow a man to judge of matters in which he is personally interested is not only contrary to the true prin-*

ciples of all law, but is repugnant to our ideas of justice, and it seems to us to submit such charge for decision to the judge against whom such prejudice was charged would be to defeat the change of judge in every case where such prejudice actually existed, for, in the language of Judge Brewer, 'All experience teaches that usually he who is prejudiced against another is unconscious of it or unwilling to admit it.'"

See also,

Buckman v. State, 101 Pac., 295 (decided in 1909).

In 1909 the Oklahoma law was amended by the passage of the following act:

"Any party to any cause pending in a court of record may, in term time or in vacation, file a written application with the clerk of the court setting forth the grounds upon which the claims are made that the judge is disqualified, and request him to so certify after a reasonable notice to the other side, same to be presented to such judge, and upon his failure so to do within three days before said cause is set for trial, application may be made to the proper tribunal for mandamus requiring him so to do."

Art. 6, Ch. 24, *Snyder's Comp. Laws of Okla.*

In *Kelly v. Ferguson*, 114 Pac., 631, the Court, in construing the statute of 1909, said:

"It is evident that the statute never intended that a judge should hear evidence and judicially pass upon the question of his own prejudice. Such trial would be almost sure to result in an unseemly contest, just as it did in this case. . . . The facts upon which the claim of prejudice is based must be set out in the original application, so that

the judge and the county attorney may know what is claimed and upon what such claim is based. . . . *We want to make it clear that the trial in cases of this kind does not take place in the lower court. It is illegal and absurd to place a judge on trial before himself. His trial would manifestly be a miserable farce. No man is competent to sit in judgment upon his own conduct or when his individual integrity or feelings are involved. The fact that he assumes that he is competent to do this is conclusive evidence of the fact that he is incompetent to properly discharge this judicial duty. . . . We are therefore of the opinion that respondent should not have attempted to hear testimony and judicially determine the question of his own prejudice. The respondent, however, opened court and placed Honorable George W. Ferguson regularly on trial before himself. . . . It is difficult for us to treat this matter seriously. It sounds more like a joke than it does like a judicial proceeding. It is the first instance that has come to our knowledge in which a judge has placed himself on trial before himself, and we truly hope that nothing of this sort will ever occur again in the State of Oklahoma."*

In *Cox v. U. S.*, 100 Fed., 293, the Circuit Court of Appeals construed the Oklahoma statute, saying:

"The application of the defendant for a change of judge conforms to the requirements of this statute and the denial of the application by the trial court and the affirmance of this ruling by the Supreme Court of the territory were error. The statute is plain, unambiguous and mandatory. Our attention has been called to a late opinion of the Supreme Court of the territory of Oklahoma—*Lincoln v. Territory* (58 Pac., 730)—in which that court construes the section of the statute we have quoted and holds, and rightly as we think, that when the accused makes affidavit that he cannot have a fair and impartial trial by reason of the bias and prejudice of the presiding judge, it is the duty of the court to order a change of judge to be effected in the

mode provided by the statute, and that a refusal to do so is error fatal on appeal to any judgment the court may thereafter render against the defendant in the cause."

In *Stephens v. Stephens*, 152 Pac., 164, the Supreme Court of Arizona said:

"So far as we have been able to discover, the courts have uniformly held where an affidavit of bias and prejudice is in the language of the statute, the presiding judge can perform no other function in connection with the case other than to make an order that the trial be had before another judge as provided by the statute. The truth of the affidavit filed is not what disqualifies the judge but the affidavit itself."

In *People v. District Court*, 152 Pac., 149, the Supreme Court of Colorado said:

"A change of judge is conditioned not upon the actual fact of his prejudice, but upon the imputation of it. The facts set forth in the recusation must, for the purposes of the motion, be accepted as true, notwithstanding they may be known to the judge and all mankind to be false. The whole matter is left to the conscience of the petitioner and affiants, and when affidavits fulfilling the requirements of the statute are presented, the change must be made and the truth of the matter is not open to question."

We respectfully submit that Section 21 of the Judicial Code should not be interpreted so that any justiciable question of law or fact is presented to the judge whose qualification is assailed.

The statute declares that if any affidavit be filed by a party, charging personal bias or prejudice on the

part of the trial judge, such judge *shall proceed no further in the cause.*

It is true that the statute declares:

(a) The affidavit shall state the fact and reasons for the belief that bias exists.

(b) The affidavit shall be filed ten days before the commencement of the term, or good cause shown for failure to file it within such time.

(c) The good faith of the affiant must be certified by counsel.

These requirements have been made to guard against the abuse of the right conferred. It was never intended to grant to the judge whose qualification was assailed, and whose actual disqualification was conclusively assumed, the right to determine whether the affiant had acted with due diligence in making the attack. Indeed, the person who proposed the act declared that any judge who would assume to act on a question of this character, would thereby establish the very fact of his disqualification.

Of course, the judge must look at the affidavit to see whether or not it is an affidavit filed under Section 21. He must peruse the paper to ascertain:

1. Whether he is charged with personal bias for or against a party.

2. Whether the affidavit has been certified by counsel to have been made in good faith.

3. Whether the affidavit contains a statement of facts and reasons on which the affiant declares that he bases his belief in the prejudice of the judge.

4. Whether the affidavit purports to show an excuse for the delay in filing the same until a day which is less than ten days prior to the commencement of the term if it be not filed before.

But the judge in question cannot:

1. Controvert the fact of bias.

2. Pass upon the truth or sufficiency of the facts and reasons on which the opinion of the affiant is based.

3. Inquire into the good faith of counsel in certifying to the affidavit.

4. Pass upon the legal sufficiency of the excuse set forth in the affidavit as good cause for failure to file the same ten days prior to the commencement of the term.

It was never intended to permit the judge whose fairness was called in question to pass judicially on any question of law or of fact, for the statute expressly declares *that such judge shall proceed no further in the cause.*

In *Murdica v. State*, 137 Pac., 575, the Court held

that the filing of an affidavit of bias prevented the judge from passing on any issue of law or fact, even though that issue arose in connection with another part of the same affidavit, the Court saying:

"We think the trial, as contemplated in the statute under consideration, begins when any controverted question of law or fact is presented to the court for determination."

The duty to pass judicially on any justiciable question arising after the affidavit is filed, devolves on the Senior Circuit Judge.

As said in the Steel Barrel case:

"Judge Lacombe (the Senior Circuit Judge) was clearly called upon to determine in the exercise of his jurisdiction as the senior circuit judge whether the situation was one in which he should designate a judge in the room and place of Judge Chatfield. He determined the matter adversely to the petitioners. If in this he made a mistake, it was one made in the course of the exercise of his legitimate jurisdiction under section 14 of the new Judicial Code, and we cannot compel him through a writ of mandamus to undo what has thus been done. *Ex parte Burtis*, 103 U. S., 238; *In re Parsons*, 150 U. S., 150."

Surely the statute does not contemplate that these questions shall be twice decided judicially, first, by the trial judge, and again by the Senior Circuit Judge. Undoubtedly, Judge Chatfield expressed the correct view when he said:

"The Court further certifies that it does not make an entry upon the records of the Court (nor does it admit) that it has any personal bias or prejudice, but on the con-

trary might call in question many of the statements or controvert many of the allegations contained in said papers."

"The Court however feels that the intent of section 21 is to cause a transfer of the case, without reference to the merits of the charge of bias, and therefore does so immediately, in order that the application of the creditors may be considered as speedily as possible by such Judge as may be designated."

In addition to the obvious and clear purpose of the framers of the act, there is every reason why the statute should be interpreted so as to withdraw from the judge whose bias is in question the duty to decide judicially any question, when as a result of such decision jurisdiction of the case might be retained, for, as pointed out by Judge Brewer:

"All experience teaches that usually he who is prejudiced against another is unconscious of it, or unwilling to admit it."

and, as said by the Supreme Court of Oklahoma, in *Kelly v. Ferguson*, 114 Pac., 631:

"No man is competent to sit in judgment upon his own conduct or when his individual integrity or feelings are involved. The fact that he assumes that he is competent to do this is conclusive evidence of the fact that he is incompetent to properly discharge this judicial duty."

The Wyoming Act of 1910 provides:

"Sec. 5147. The defendant in a criminal action may make an affidavit stating that he believes he cannot receive a fair trial owing to the bias or prejudice of the judge

or the excitement or prejudice against him in the county; the prosecuting attorney may thereupon traverse by his affidavit the allegations of defendant, except those concerning the bias or prejudice of the judge, and the court or judge shall thereupon set down the issue so presented for trial before him at a stated time, at which times both parties shall present their witnesses, who shall be examined under oath orally, and if it appears to the court or judge, upon such hearing, that the trial would be more impartial in another county, the application shall be granted."

In *Murdica v. State*, 137 Pac., 575, the defendant filed an affidavit, setting up the existence of bias on the part of the judge, and local prejudice in the county. The judge heard and determined the question of local prejudice, and after deciding that question, called in another judge to hear the cause. The Supreme Court reversed the judgment, saying:

"The purpose of the statute is to give the defendant the right to a fair trial before a judge and jury who are neither biased nor prejudiced. The ruling upon a motion for a change of venue, when contested, involves the weighing of evidence and the exercise of a legal discretion, and under the statute the filing of the affidavit for a change of judge alone disqualifies the judge against whom such affidavit is directed from presiding at the trial by reason of an indisputable presumption of bias or prejudice arising from the making and filing of such affidavit. To permit a judge against whom objection has been properly made to preside at the hearing and determine a disputed motion for a change of venue or a continuance might be far more prejudicial than a ruling on the admission of testimony or the giving of an instruction. It is true that the statute gives the defendant the right to file such an affidavit, but we cannot say that the statute should be held for naught because the right or privilege is subject to abuse, but, if

it be so, then the remedy is with the Legislature and not with the courts. It will be observed that by section 5147, upon filing an affidavit objecting to the judge, no traverse to such affidavit is permitted to be filed. In other words, no issue of fact is or can be permitted. No legal discretion is lodged in the court, for the filing and calling the court's attention to such an objection of record disqualifies the judge so objected to from trying the case. It is suggested that the statute is subject to the construction that the judge is disqualified only from presiding at the trial; that the trial begins after the jury is sworn; and that the disqualification goes to the trial or continuance of the case alone and not to preliminary matters leading up to the trial."

"We think the trial, as contemplated in the statute under consideration, begins when any controverted question of law or fact is presented to the court for determination."

In the case of *Ex parte Fairbanks*, 194 Fed., 978, the judge, whose fairness was called in question, undertook to pass judicially on all matters connected with the affidavit. The opinion of the judge in that cause is, we believe, the strongest argument against the practice adopted. The conclusion reached on the questions of law therein discussed, was obviously influenced by the personal feeling aroused by the charge. The decisions in *Henry v. Speer* and the Steel Barrel case render it unnecessary to discuss the opinion. In fact, that decision justifies the observations of the Oklahoma court. Indeed, the opinion in the case of *Ex parte Fairbanks* emphasizes the impropriety of placing upon a judge the burden of passing judicially on any question involved in an issue arising on the question of the qualification of the judge him-

self. Nothing could be more destructive of public confidence in the courts; nothing could more effectually defeat the primary object of the enactment of Section 21.

We submit that the interpretation of Section 21 here contended for is correct, but if it be otherwise,—if the sufficiency of the facts and reasons set forth in the affidavit are subject to review, and the question of the sufficiency of the excuse for not filing the affidavit ten days prior to the commencement of the term may be inquired into by the judge—still, there is no doubt that in this case mandamus should issue. But as these questions are fully discussed in the brief of counsel for the Trustee, we will say nothing further on this branch of the case.

Respectfully submitted.

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

EX PARTE EQUITABLE TRUST COMPANY OF
NEW YORK—ORIGINAL NO. 169.

IN THE MATTER OF THE PETITION OF THE
EQUITABLE TRUST COMPANY OF NEW
YORK, AS TRUSTEE, FOR A WRIT OF MAN-
DAMUS—ORIGINAL NO. 2757.

IN THE MATTER OF THE APPEAL OF THE
EQUITABLE TRUST COMPANY FROM THE
ORDER ISSUING THE INJUNCTION, DATED
FEBRUARY 21, 1916.

Opinion of U. S. Circuit Court of Appeals.

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IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

EX PARTE EQUITABLE TRUST COMPANY OF
NEW YORK, AS TRUSTEE OF THE FIRST
MORTGAGE OF THE WESTERN PACIFIC
RAILWAY COMPANY, PLAINTIFF IN THE
ACTION OF EQUITABLE TRUST COMPANY
OF NEW YORK, AS TRUSTEE, AGAINST
WESTERN PACIFIC RAILWAY COMPANY.

No. 2755.

THE EQUITABLE TRUST COMPANY OF NEW
YORK, AS TRUSTEE,

Complainant and Appellant,

vs.

WESTERN PACIFIC RAILWAY COMPANY,
BOCA AND LOYALTON RAILROAD COM-
PANY, CHESTER L. HOVEY, as Receiver for
BOCA AND LOYALTON RAILROAD COM-
PANY, and MERCANTILE TRUST COMPANY
OF SAN FRANCISCO, AS TRUSTEE,

Defendants and Appellees,

And

CENTRAL TRUST COMPANY OF NEW YORK,
AS TRUSTEE,

Intervening Defendant and Appellee,

WARREN OLNEY, JR., and FRANK G. DRUMM,
Receivers named as Appellees.

No. 2756.

IN THE MATTER OF THE PETITION OF THE
EQUITABLE TRUST COMPANY OF NEW
YORK, AS TRUSTEE, FOR A WRIT OF MAN-
DAMUS TO BE ISSUED AND DIRECTED
TO HONORABLE WILLIAM C. VAN FLEET,
JUDGE OF THE DISTRICT COURT OF THE
UNITED STATES FOR THE NORTHERN DIS-
TRICT OF CALIFORNIA AND TO SAID DIS-
TRICT THEREOF.

No. 2757.

Before GILBERT, ROSS and HUNT, Circuit Judges.

HUNT, Circuit Judge:

The Equitable Trust Company of New York, as trustee, instituted foreclosure proceedings in the District Court in the Northern District of California to foreclose the first mortgage of the Western Pacific Railway Company, bearing date September 1, 1903, but acknowledged and delivered June 23, 1905. The trust company, as trustee, and plaintiff in the court below, and appellant here, also asked that a receiver be appointed *pendente lite*. Jurisdiction was based upon diversity of citizenship.

The complaint sets forth that the entire amount of bonds secured by the mortgage sought to be foreclosed, \$50,000,000, had been duly issued and were then outstanding, and the only default alleged was in the payment of one semi-annual installment of interest which matured March 1, 1915, amounting to \$1,250,000. The prayer so far as it related to the appointment of a receiver was substantially, that a receiver be appointed to take possession of and to operate the properties of the Western Pacific Railway Company which are subject to the lien of the first mortgage, and to collect and receive the earnings, revenues, rents, issues, profits and other income thereof, and to apply the net income thereof to the benefit of holders of bonds secured by such first mortgage as provided by the terms thereof, and with such other power and authority and with limitations of power and authority as to the court should seem proper.

The complaint was filed on the 2d of March, 1915. On that day the Western Pacific Company, then the only defendant, by answer admitted all the allegations of the complaint, and on the following day the District Court appointed two receivers, who were duly qualified and are still acting. The court made them receivers of all the property of the Western Pacific Railway Company, and directed them to protect title, take possession, to continue operation, and to prosecute all such suits as may be necessary in their judgment for the protection of the property and trust vested in them, and to appear and conduct the prosecution or defense of any suit then pending in any court against the Western Pacific Railway Company, or any company

operated in the interests of said railway company, where, in the judgment of the receivers, it was necessary for the proper protection of the property placed in that charge for the interests and rights of creditors.

March 30, 1915, the Equitable Trust Company, through the trustee, filed its amended bill against the Western Pacific Company, and averred substantially the things contained in the original bill.

On October 25, 1915, Central Trust Company of New York, which had become a party to the suit by intervention, filed its answer and cross-bill. Thereafter a stipulation was made by Central Trust Company and consenting to a decree of foreclosure and sale, so that it is not very important to state the contents of the cross-bill other than that it alleged that Central Trust Company is the trustee under the second mortgage of the Western Pacific Railway Company; this second mortgage covering all the properties of the Western Pacific Company, but is subject and subordinate to the first mortgage; that under the second mortgage there are outstanding bonds aggregating in par value \$25,000,000, which bear interest at five per cent. per annum; and that under the terms of the second mortgage and because of the order appointing receivers of the property of the Western Pacific Railway Company, the Central Trust Company became entitled to foreclose and collect the entire amount secured by its mortgage.

The Equitable Trust Company, as trustee, on November 1, 1915, answered the cross-bill of Central Trust Company admitting the material averments of the cross-bill; and on November 22, 1915, the Western Pacific Company files its answer to the cross-bill admitting all the allegations thereof.

On January 13, 1916, the Equitable Trust Company files its supplemental and second amended bill. The substance of the averments of this supplemental bill is that since the amended bill had been filed the defendant railway company had defaulted in the payment of a second installment of interest, \$1,250,000, due September 1, 1915; that the trustee under the mortgage had declared the principal of the \$50,000,000 outstanding bonds to be due, and that that principal and interest were due and in default. It was alleged too that the Boca and Loyaltan Rail-

road, Mercantile Trust Company of San Francisco, as trustee under its first mortgage, and Chester L. Hovey, as receiver of the property of the Boca and Loyalton Company, claimed an interest in some three and three-quarters miles of track of the Western Pacific Railway, and that such interest was subsequent to and inferior to the first mortgage of the Western Pacific.

The Western Pacific Company, the Boca and Loyalton Company, and the Central Trust Company filed their respective answers admitting the allegations of the supplemental and second amended complaint. The Mercantile Trust Company of San Francisco, as trustee, and Hovey, as receiver, filed their answers, and asserted a priority over the lien of the first mortgage of the Western Pacific Company of the interest of the Boca and Loyalton Company in the three and three-quarters miles of track referred to. On March 6, 1916, the Equitable Trust Company filed and submitted to the court certain stipulations:

(a) Stipulation between the Equitable Trust Company as trustee, and the Western Pacific Company, and Central Trust Company waiving the right to take testimony, admitting the truth of the facts set forth in the amended bill and in the supplemental bill, and recited in a form for foreclosure decree and sale attached to the stipulation, and consenting to the entry of such decree forthwith, or at the time of any such early hearing as the court should assign.

(b) Stipulation between the Equitable Trust Company, as trustee, and Boca and Loyalton Railroad Company, Mercantile Trust Company of San Francisco, as trustee, and Chester L. Hovey as receiver, that a decree of foreclosure and sale might be entered forthwith provided that it should contain a provision that such sale should be made subject to all then existing rights of such defendants to a trackage right over the three and three-fourths miles of track heretofore alluded to.

(c) Stipulations by the Southern Pacific Company and Utah Fuel Company, claimants against the Western Pacific Company, who had presented their claims as preferred claims, and whose claims had not been paid, consenting to the entry of a decree of sale in accordance with the prayer of the amended bill and

the supplemental and amended bill, and consenting to the setting of the cause for hearing.

Counsel for the Equitable Trust Company, as trustee, moved the court for a decree of foreclosure and sale in the form submitted, or that if such motion be denied, the cause be set for hearing, and for the entry of such decree at such early day as the court should assign. No party to the cause objected, but the receivers protested. The court allowed them to offer evidence and over the objection of plaintiff's counsel continued the hearing until March 16, 1916.

With these motions counsel for the trustee submitted two affidavits, one made by the solicitor for the trustee, setting up the consent of all parties that a decree of foreclosure and sale should be entered forthwith, and that all creditors whose claims had been presented and allowed had been paid in full; and another made by counsel for the Reorganization Committee of Holders of First Mortgage Bonds of the Western Pacific Company setting up that on May 1, 1915, a Bondholders' Protective Agreement had been framed; that on December 15, 1915, the holders of more than \$37,000,000 of such bonds had deposited them under the agreement, and on that date a Plan and Agreement for Reorganization had been framed under which the holders of more than \$43,000,000 of bonds had deposited them; that in order to procure the underwriting required by such Plan and Agreement for the sale of \$20,000,000 principal amount of bonds to be issued thereunder the committee had procured an undertaking of certain bankers to secure an Underwriting Syndicate Agreement; that the undertaking had been performed, and that by the terms of the Plan and Agreement it must be declared operative before March 15, 1916; that by the terms of the Underwriting Agreement that agreement expires July 1, 1916; that in order to carry out the Plan and Agreement it is necessary that the properties covered by the Western Pacific Company's first mortgage should be sold and steps necessary for the enjoyment of the Underwriting Agreement should be taken before July 1, 1916; that if delay in the entry of a decree of foreclosure and sale should be had the bondholders who were parties to it must become liable for various large sums for underwriting, commissions

and expenses; that the plan provides for the making of large extensions of the railroad out of the fund provided to be raised by the bond issue, and that if the plan should fail the money can be again had only upon less favorable terms, if at all; and that it is unnecessary that the receivership should be continued. To this affidavit were attached copies of the Protective Agreement, the Plan and Agreement for Reorganization, and the Underwriting Syndicate Agreement.

Certain other matters may here be stated:

On May 18, 1915, the receivers petitioned the court for six months' time within which to investigate and report to the court concerning matters and things in connection with certain contracts, including what is designated as Contract B, and that pending examination of such contracts they might be effective without prejudice. The court ordered that a hearing upon the petition be had upon June 14, 1915.

Contract B was made on June 23, 1905, the same day upon which the first mortgage of the Western Pacific Company was executed. The parties to it were the Denver and Rio Grande Railroad Company (called the Denver Company), and the Rio Grande Western Company (called the Western Company), as parties of the first part, Western Pacific Railway Company, (called the Pacific Company), as party of the second part, and Bowling Green Trust Company, as trustee under the first mortgage of the Western Pacific Railway Company (called the Trustee), as party of the third part. The Equitable Trust Company of New York is successor to Bowling Green Trust Company as trustee under the first mortgage of the Western Pacific Railway Company; and the Denver and Rio Grande Railroad Company and The Rio Grande Railway Company are now consolidated into The Denver and Rio Grande Railroad Company.

Contract B recites:

That the Denver Company operates a railway line from Denver, Colorado, westerly to Grand Junction, Colorado, at which point it connects with a railway operated by the Western Company from Grand Junction, Colorado, westerly via Salt Lake City, Utah, to Ogden, Utah, connection at Salt Lake City with the railway of the Pacific Company:

that the Pacific Company has partially constructed, and is constructing the remainder of, a railway from San Francisco easterly to Salt Lake City, at which point the portion already constructed connects with the railway of the Western Company:

that the Denver Company owns substantially all the stock of the Western Company, and the Denver Company and the Western Company, together, own a majority of the authorized stock of the Pacific Company:

that there is no line of railway which furnishes an outlet for either the Denver Company or the Western Company to the Pacific Coast that is not controlled by a competitor:

that the Pacific Company has authorized an issue of \$50,000,000 bonds for the purpose of completing and equipping its railway, interest upon which at five per cent. per annum is to be payable semi-annually on the first day of March and of September, and to secure the payment thereof has authorized its first mortgage to the trustee upon its railway property, owned or to be acquired, and upon its said line of railway, and by said mortgage has covenanted to create a sinking fund to consist of \$50,000 to be paid to the trustee during the year beginning September 1, 1910, and each year thereafter until the bonds shall be wholly paid:

that the Pacific Company intends to pledge its interest under the agreement and to make the benefits to be derived therefrom a part of the security provided by said mortgage, to the end that it may be enabled to sell its bonds at a higher price than it could if the agreement were not so subordinated and pledged.

that the railways owned and operated by the respective railway companies, parties to the contract, shall be operated as a joint through line for all purposes:

that the Denver and Western shall turn over to the Pacific Company certain traffic:

that whenever the Pacific Company shall not have sufficient freight equipment to perform its part in the operation of these three railways as a joint transportation system, the Denver Company and the Western Company shall furnish such additional cars as shall be required:

that the Denver Company and the Western Company jointly

and severally shall purchase semi-annually demand promissory notes of the Pacific Company, to the amount by which the gross earnings and income of the Pacific Company during the preceding fiscal half-year shall be insufficient to meet the sum of operating expenses; taxes which may become liens; interest falling due upon the Pacific Company's \$50,000,000 first mortgage gold bonds during the then current half-year; the Pacific Company's annual contribution to the sinking fund provided for in its first mortgage; any other charges or expenses that the Pacific Company shall necessarily pay to continue operation of its property and to protect unimpaired the lien and priority of its first mortgage; interest upon all indebtedness of the Pacific Company other than its first mortgage bonds.

Without reciting the many provisions in detail, among other covenants material to the present controversy, we give the substance of these:

That the payments made to the trustee as provided in the later paragraph shall be credited as payments of the purchase price of promissory notes of the Pacific Company, to be purchased by the Denver and Western Company.

The Denver and Western Company covenanted that they would semi-annually pay unto the trustee out of the purchase price of the notes such amount as would together with the amount actually appropriated by the Pacific Company out of its earnings and other income and by it paid over to its fiscal agent in New York or San Francisco for the purpose of paying the interest to fall due upon the Pacific Company's first mortgage bonds as would be sufficient to pay all such semi-annual installment of interest, and an amount sufficient together with the amount appropriated by the Pacific Company out of its earnings and other income and by it paid over to the trustee for the purpose of meeting the sinking fund payment sufficient to meet the sinking fund payment for the current half year.

The parties of the first part were to pay to that trustee under the first mortgage of the Pacific Company amounts required to be paid by them pursuant to the provisions of certain sections of the contract to supply with the amounts paid by the Pacific Company, sufficient to pay the semi-annual interest on the first mortgage bonds of the Pacific Company as such interest might

fall due, and such additional amount as with the amount already paid to the trustee by the Pacific Company for that purpose of making up the full amount of payment for the sinking fund in accordance with the first mortgage requirements; and it was covenanted that all amounts payable to the trustee under the agreement to cover interest should constitute a trust fund for the payment of interest due, or thereafter to become due, upon the Pacific Company's first mortgage bonds, and should be by the trustee made available for the payment of interest upon said bonds as they should mature and payment be demanded. It was agreed that neither the Pacific Company nor anyone claiming under them, save such persons as may be entitled to receive the interest on the first mortgage bonds should be entitled to or possess any interest in, lien upon, or claim upon said fund any part thereof.

The Denver and the Western Company waived any right to demand the delivery of the promissory notes to be purchased before or coincidently with the payment by them with the purchase price of any such notes as provided for, and that they will promptly pay the purchase price of all notes that they are obliged to take, although the Pacific Company may not have taken steps necessary to deliver such promissory notes, but neither the Denver nor the Western Company by reason of making such payments prior to the receipt of the notes shall be prejudiced in the right to receive or enforce the delivery by the Pacific Company of such notes.

The Pacific Company covenanted that it would construct its railway as contemplated and arrange with respect to traffic as provided, and make trackage agreements and operating rules, all as provided for; that it would make the promissory notes provided for, to be sold to the Denver Company.

That the Pacific Company shall apply all its gross earnings and income to the payment of its operating expenses, its taxes, and to protect unimpaired the lien of its first mortgage; the interest on its bonds; its annual contribution to the sinking fund provided by its first mortgage; and any other charge or expense which it may be necessary for it to pay in order to assure the continued and efficient operation of its property and to protect the priority of its first mortgage.

The Pacific Company further covenanted that it would pay at certain times to its fiscal agents the installment of interest upon its mortgage bonds, and cause its fiscal agents to pay all moneys over to the trustee and pay to the trustee moneys to be paid under the sinking fund payment, as required by the first mortgage. The trustee under Contract B agreed that it would hold all moneys received by it pursuant to the provisions of Contract B in trust for, and would apply the same to the purposes prescribed, and for the uses named in the contract, and that it would from time to time upon request of any holder or holders of bonds, secured by the first mortgage of the Pacific Company, acting alone or with the Pacific Company, take steps to enforce by a suit or suits in equity or at law, or by other proper proceedings, to be prosecuted or taken in its own name, or in the name of the Pacific Company, or in the name of both, all the terms and provisions of Article II of the agreement that require any payments to be made to the trustee by the parties of the first part or either of them, and that upon request of the holder or holders of twenty per cent. in amount of the first mortgage bonds outstanding would likewise enforce any and all other provisions of the agreement as provided in Article VI of the contract.

Article VI of Contract B was a mutual agreement by and between the parties to the instrument each severally agreeing with each and all of the others.

Included in such covenants were these:

The trustee shall give notification in the amount of moneys held by it for the purpose of paying interest under the terms of the first mortgage bonds at prescribed times, and the amount applicable as provided in the contract shall be equal to the difference between the amount so required less the amount so held by the trustee, as shall on the date of the notice actually have been paid by the Pacific Company to its fiscal agent for the purpose of making such payment of interest, and the trustee shall at a certain time notify the parties of the amount held by it to be paid to the sinking fund payment as required by the terms of the mortgage, and the amount of moneys to be paid by the Pacific Company applicable to the making of the sinking fund payment as required in the

agreement, shall be the difference between the amount so required and the amount so held by the trustee. It was provided that failure on the part of the Pacific Company to perform the covenants of the agreements shall not excuse the Denver and Western Company from fulfilling their obligations; but if they should fail the Pacific Company may resort to suit for specific performance or action for damages as may be appropriate, but nothing shall be taken to authorize any action which may impair in any manner the lien or security of the first mortgage of the Pacific Company or preventing or interfering with the exercise of any of the remedies thereby granted to the trustee, and time is of the essence in all the covenants to be performed by the Pacific Company with relation to payments.

It is expressly covenanted that the agreement should be in force and binding upon all parties until all of the \$50,000,000 first mortgage bonds shall be fully paid, principal and interest, as provided in the first mortgage of the Pacific Company, and that the agreement "shall run with the railways of the said several railway companies, parties hereto, into whosoever hands the same may come; and this agreement and the provisions thereof shall be so construed that any person or persons, corporation or corporations, which may at any time acquire in any manner any of the said several railways of the parties hereto shall be held and be deemed to have expressly agreed by virtue of the act or acts, deed or deeds, or other instrument or transaction . . . to observe and perform all of the terms required by this agreement to be performed or to be observed by the party hereto from whom immediately or indirectly, the said person or persons, corporation or corporations, may have acquired the said railways or railway, and the said person or persons, corporation or corporations, . . . shall be held to be bound by an express contract with the parties hereto and by and upon an express trust to perform and observe as aforesaid all the terms hereof, including all acts and things that may be necessary to preserve in full force the several obligations and agreements herein established or contained for the full term hereof."

The obligations and provisions of the contract are also expressly deemed to be a part of the consideration of any con-

tract or contracts by which any person may acquire or undertake to acquire the said several railways or any of them. Each of the railway companies covenants with all the other parties that if at any time during the continuance of the agreement it shall in any way transfer its property or rights and franchises to any of the premises affected by the mortgage, that any instrument shall contain a covenant that it is made subject to all the provisions of Contract B; and that the grantee or transferee, and any person claiming under such grantee or transferee shall, by the acceptance of such instrument, and the acceptance of such grant or conveyance, become bound to perform and observe all of the terms required by the contract to be performed and observed by the party making such grant or conveyance, including all acts and things which may be necessary to preserve in full force the several obligations and agreements established and contained in the contract.

Among the mutual covenants is a provision: That in the event of default by the Pacific Company under its first mortgage the trustee shall forthwith become vested with the right, upon written request of the holders of two-thirds in amount of outstanding bonds secured by the mortgage, to terminate the agreement; "but such termination of this agreement shall not be deemed to and shall not release, nor shall anything else done hereunder release, the rights of the trustee or of the holders of the first mortgage bonds of the Pacific Company to the benefits of the agreements of the railway companies, parties of the first part, to make the payments" provided for in paragraphs 4 and 5 of article II.

The concluding clauses of the contract are that:

"The pledge to the trustee of all the rights, benefits and advantages to which the Pacific Company may be entitled hereunder contained in said first mortgage of the Pacific Company is hereby assented to, ratified and confirmed"; and it was expressly agreed that the interest of each and all the parties to Contract B should be subject and subordinate in any and every respect to the first mortgage of the Pacific Company.

The mortgage made by the Western Pacific Company transferred and assigned to the trustee as security all the property of the Western Pacific Company then owned or thereafter to

be acquired by the Western Pacific Company. Among the properties specially included in the mortgage were the rights which the Western Pacific Railway Company then owned or should acquire in Contract B, which was described. Upon default, the mortgage provided for sale by the trustee by public auction or sale under judicial proceedings of all and singular the mortgaged property held by the trustee. This exception appears:

"Except only the right of the Trustee and of the holders of the bonds secured hereby under said agreement between The Denver & Rio Grande Railroad Company, the Rio Grande Western Railway Company, Western Pacific Company and Bowling Green Trust Company, to require said two first named companies and each of them to make any payment or payments of money to the Trustee, and to recover damages from said companies or either of them in default of any such payment or payments, which said rights and all rights secured by said agreement necessary for the enjoyment and enforcement of such rights shall remain in and survive to the Trustee for the benefit of the holders of the bonds secured hereby, after and despite any and every sale made by virtue of this indenture, whether under the power of sale hereby granted and conferred or pursuant to judicial proceedings."

Among the provisions of the mortgage with respect to delivery upon completion of any sale to the Trustee of all agreements held by the trustee and sold to the purchaser under proper assignments, we find this language:

"Provided, however, that so long as The Denver & Rio Grande Railroad Company and The Rio Grande Western Railway Company, or either of them, shall, by the terms of their said agreement with the Railway Company and the Trustee, be under obligation to make any payment or payments to the Trustee either for the purpose of providing funds wherewith to make payments of interest upon the bonds secured hereby or wherewith to make any payment into the sinking fund hereby provided for, the Trustee shall not deliver said last mentioned agreement to any such purchaser or purchasers, although such purchaser or purchasers may

have succeeded to any or all the interests and rights of the railway company thereunder."

And, further, that:

"After any sale or sales, whether under the power of sale hereby granted or pursuant to judicial proceedings, any and all moneys that may be received by the Trustee under the provisions of said agreement between The Denver & Rio Grande Railroad Company, The Rio Grande Western Railway Company, Western Pacific Railway Company and Bowling Green Trust Company, intended to provide the Trustee with moneys wherewith to pay interest upon the bonds secured hereby, shall forthwith be applied by the Trustee to the payment *pro rata* of the interest upon such of the bonds secured hereby as shall then remain unpaid in whole or in part whether or not the same shall have been reduced to judgment; and any and all moneys that may be received by the Trustee after any such sale or sales, under the provisions of said agreement intended to provide the Trustee with moneys wherewith to make payments into the sinking fund hereby established shall forthwith be applied by the Trustee to the payment *pro rata* of the amounts remaining due for principal and interest upon the bonds secured hereby and then unpaid in whole or in part."

On March 26, 1915, the Equitable Trust Company of New York as trustee began suit in the United States District Court for the Southern District of New York against the Western Pacific Railway Company by filing an ancillary bill to the original bill filed here in California in the District Court. The District Court in New York appointed the same receivers of the properties of the Western Pacific in that jurisdiction as the District Court had appointed here in California.

On the 27th of May, the Equitable Trust Company, as trustee, also filed in the District Court of New York what it denominated its ancillary dependent action in equity against The Denver & Rio Grande Railroad Company, Western Pacific Railway Company, and certain other fictitiously named defendants. This bill sets forth the agreement of The Denver Company as contained in Contract B, the default of the Western Pacific and the Denver Company with respect to interest

payment upon the first mortgage bonds of the Pacific Company, due March 1, 1915, and the default of both companies in payments under the sinking fund requirements under the first mortgage; that it was agreed that the obligations under Contract B should run with the respective railroads; that suits in foreclosure of the Western Pacific Company's first mortgage have been commenced in California and that jurisdiction has been had by ancillary suits in Utah and New York; that the principal of the first mortgage bonds would soon be declared to be due; that a sale of the mortgaged properties would be had at an early day; that in all probability such sale would realize an amount less than the amount of bonds secured by the mortgage, principal and interest; that the Western Pacific Company was insolvent; and that recourse must therefore be had to the Denver Company for the payment of the debt. Apparently the theory of the bill was that the amount of the liability under Contract B of the Denver Company to the Trustee was perhaps only the amount of the difference between the earnings of the Western Pacific and the amount required for interest and sinking fund. At all events plaintiff in their bill asked for the true meaning of the contract in respect to the sinking fund payments.

An account of earnings of the Western Pacific Company from the time of the creation of the first mortgage until the time of such accounting is asked for, and adjudication is prayed that the amount required to be paid or to be secured to be paid by the Denver Company in fulfillment of its obligations under the contract be had. The prayer asked for a construction and effect of Contract B with respect to the provision that the agreement "shall run with the railways of the several companies named therein"; and that the provision be enforced as against the New Denver Company, in accordance with the meaning as decreed by the court. The further prayer was as follows:

"That in respect to the amount found, upon the accounting and adjudication hereinabove prayed for, to be due from the Old Denver Company either under the said Contract B or under the said guaranties, the court decree and direct the payment thereof by the New Denver Company by a short day

to be named by the court; that upon the failure of the New Denver Company to make such payment accordingly, the amount thereof be by the decree of this honorable court charged upon the property of the New Denver Company, and that all and singular the property and effects of the New Denver Company be sequestered in aid of the said decree and in order to the enforcement and satisfaction thereof. That, in the same event, a receiver or receivers be appointed by the court to take possession of the railways and other property and franchises of the defendant the New Denver Company, and the earnings, income and proceeds thereof, with power to operate the said property, and with all such powers and authority as may be required to preserve the same until the sale thereof, as the same may be decreed and ordered by this honorable court, and to secure the earnings of such railroad property and franchises to the use of your orator and of the holders of said first Mortgage Five Per Cent. Thirty Year Gold Bonds of the Western Pacific Company."

On June 4, 1915, the Receivers petitioned the District Court in California for instructions in respect to Contract B. On June 9, 1915, hearing upon this petition was had, and on June 10th the court of its own motion directed that The Equitable Trust Company, as trustee, show cause why the dependent suit in New York should not be dismissed or its prosecution stayed by the Trustee until the further order of the court, and the court restrained the trust company, Trustee, from taking any further step of any nature in the New York suit until the return day of the order made here in California. On June 28, 1915, argument was had before the District Court in California, the Receivers appearing by their counsel and the trust company appearing by its solicitor. On February 21, 1916, the court enjoined the Equitable Trust Company from further proceeding with its dependent suit in New York, and from bringing any further action proceeding involving Contract B, and from taking any steps which might impair the obligation of any of the provisions of Contract B without first obtaining leave of the court in California; and ordered that the Denver & Rio Grande Railroad Company and the Missouri Pacific Railroad Company be made parties to the suit, and be com-

pelled respectively to interplead, and to set up any rights which they or either of them might have in the suit.

The Equitable Trust Company has appealed to this Court from the injunctive part of the order of the District Court just referred to, and it also applies to this Court for a writ of prohibition to prevent the District Court from compelling the Denver & Rio Grande Railroad Company and the Missouri Pacific Railroad Company to interplead in the foreclosure suit.

Writ of Mandamus is also asked directing the District Court to grant the motion of the plaintiff made when the stipulations heretofore referred to were filed to enter foreclosure decree. To this petition answer is filed.

There are also before us petitions to intervene in opposition to the issuance of the writs of Mandate and Prohibition as asked for. They set up that the Savings Bank and Trust Company of San Francisco owns 125 and represents the holders of 575 additional first mortgage bonds of the Western Pacific; that on March 13, 1916, it filed petition in the United States District Court of California for leave to intervene in the suit there pending between the Equitable Trust Company, trustee, and the Western Pacific, in which the order of injunction heretofore referred to was made; that the District Court ordered the petition to be heard on March 20th, a date subsequent to the hearings before this Court.

The petitioner's position is, substantially, as follows:

As minority bondholders they are not satisfied with the plan or reorganization. They say Contract B creates an equitable lien on the Denver Railway as of the date of that contract, June 23, 1905, and that such lien is ahead of certain outstanding refunding bonds (over \$33,000,000 in amount), issued by the Denver & Rio Grande Railroad Company on August 1, 1908, and ahead of \$10,000,000 of certain outstanding adjustment bonds issued by the Denver & Rio Grande Company in May, 1912. It is argued that if Contract B has created an equitable lien as of its date, the earnings of the Denver railroad will be enough to pay the interest upon the Western Pacific Railway bonds until the principal is fully paid in as provided in Contract B, but not quite enough to pay the interest on all the refunding bonds and all the adjustment bonds:

but if no equitable lien exists then the earnings of the Denver are insufficient to pay its refunding and adjustment bonds and the Western Pacific bonds. Petitioners insist that Contract B is an equitable lien and that a decision that it is must vitally affect the value of their Western Pacific bonds. They aver that the Equitable Trust Company, as trustee, is not insisting that there is such an equitable lien and that the Trustee is not using all proper efforts to protect the rights of the bondholders of the Western Pacific; that the Denver Company should intervene in the foreclosure suit; that the Trustee herein and the Western Pacific whose stock is owned by the Denver and the Central Trust Company, trustee, for the second mortgage bondholders, the bonds being owned by the Denver Company, and the Boca & Loylton whose stock is owned by the Denver Company, all consenting to decree, are really the Denver Company.

The complaint in intervention enters upon some history of the bond issue of the Denver Company, and of the sales of the first and refunding bonds of that company through the medium of certain bankers in New York; alleges that the Denver Company made a trust deed to secure its first and refunding bonds, and that such deed of trust referred to Contract B, thus giving the parties notice; that in 1912, the Denver Company made another deed of trust and another mortgage to secure its adjustment bonds, amounting to \$10,000,000; that the adjustment and refunding bonds issued by the Denver Company were negotiated through certain bankers named; that the same bankers who negotiated these bonds initiated the reorganization scheme of the Western Pacific and the Denver & Rio Grande; that the non-payment of interest by the Denver Company to the Western Pacific of the interest due by the Western Pacific in March, 1915, and the consequent default, and the filing of the foreclosure suit with the application for the appointment of a receiver immediately followed; that the Bondholders' Protective Committee is the same as the Reorganization Committee; and that in the plan to create a holding committee the members of the Reorganization Committee will be on the board of directors of the operating corporation of the plan.

It is alleged that the bankers interested in the reorganization scheme caused the institution of the present suit, and the institution of the suit in the United States District Court in New York; that in the New York suit the Bankers' Trust Company, trustee under the mortgage securing the first and refunding bonds of the Denver Company, and the New York Trust Company, trustee under the mortgage securing the adjustment bonds of the Denver Company, were not made parties; that in the New York suit the Equitable Trust Company, trustee, did not ask the court to declare that the obligation of the Denver Company under Contract B would be a lien prior to the rights of the holders of the Denver Company's first and refunding bonds or its adjustment bonds; and that if the New York suit is allowed to proceed the rights of the intervenors and other holders of the first mortgage bonds of the Western Pacific will be imperiled and lost, and the result will be that the bonds of the intervenors would be subordinated to certain first and refunding bonds and adjustment bonds of the Denver Company, all of which were issued through the medium of certain named bankers, who, it is alleged, cause the bringing of the suit. Intervenors also allege that the Equitable Trust Company by its course in the foreclosure proceeding involved in this appeal, and its course in proceeding in the New York suit have been against the interest of the first mortgage bondholders of the Western Pacific; and that the Denver Company is endeavoring to obtain a decree reversing the order of the District Court herein appealed from to the end that it may proceed in New York with its litigation, which will be injurious to the interest of the bondholders; that the plan for reorganization is intended to operate to the advantage of the Denver Company by enabling the reorganization committee to purchase at the foreclosure sale of the properties of the Western Pacific all the properties of that company covered by the first mortgage at a price which the committee deems proper; and that the claims of depositing bondholders against the Denver Company will be turned over to the reorganization, and that non-assenting bondholders will receive only their distributive share of the proceeds of the sale of the property, the intention being

apparently to deprive the non-depositing bondholders of their claims against the Denver Company on account of Contract B; that neither the Denver Company nor the Bankers' Trust Company, nor the New York Trust Company has consented to the decree of foreclosure against the Western Pacific, and if the properties of the Western Pacific are sold and the proceeds applied upon a judgment, and the judgment docketed against the railway company if deficient that the Denver Company, the Bankers' Trust Company and the New York Trust Company may claim that the obligation of the Denver Company under Contract B has been extinguished.

The prayer of the intervenor is that the true meaning of Contract B in respect to the obligations of the Denver Company to the Western Pacific and to the Trustee and to all holders of first mortgage bonds be declared; that the court order the Bankers Trust Company and the New York Trust Company, and the trustees under the bond and mortgage of the Denver Company to be brought in as parties, and the rights of intervenors and of holders of first mortgage bonds of the Western Pacific and of the Trustee under Contract B, and of the Western Pacific and the Denver under Contract B, be determined and that a lien be adjudged upon the railroad and property of the Denver Company as of June 23, 1905, and be held superior to any mortgage or lien of the Denver Company and the Bankers Trust Company, as trustee, in refunding bonds of the Denver Company; and that it be declared a lien ahead of the adjustment bonds of the Denver Company, and that no sale of the Western Pacific property be granted until the Denver Company and the Bankers Trust Company and the New York Trust Company shall become parties to the suit, and shall enter into an agreement protecting the interest and claims of the intervenors and first mortgage bondholders of the Western Pacific.

Further prayer is that before ordering any sale of the properties of the Western Pacific the court take evidence with respect to the value of the Western Pacific and fix an up-set price below which the commissioner making the sale will not be permitted to receive a bid for said properties; and that the up-set price be high enough to properly protect the interest

of intervenors and of first mortgage bondholders not parties to the plan of reorganization.

From the statement just made it appears that on March 1, 1916, as between the parties to the suit in foreclosure there was but one disputed issue before the court. That controverted issue involved the right of the Boca & Loyalton Railroad Company in the three and a fraction miles of the Western Pacific Railway Company, sole defendant, to survive foreclosure of the first mortgage of the Western Pacific. But inasmuch as this matter was settled or adjusted between the parties to the suit before the decree was asked, it is unnecessary to dwell upon it at greater length. The parties to the suit were all agreeable to a decree in foreclosure, and upon the showing made by affidavit and pleadings before the court we think were entitled to have the case proceed with convenient expedition unless some matter arose which called for inquiry and delay. We say this because the affidavits presented to the court disclosed that the relief which the Trustee asked for in behalf of the mortgage bondholders could only be wholly effectual by prompt judicial enforcement of the rights of the trustee. As already shown, among the circumstances put before the court were that holders of more than \$37,000,000 of first mortgage bonds had deposited their bonds pursuant to a plan of reorganization under which an underwriting for the sale of \$20,000,000 principal amount of bonds were to be issued by the purchase at the sale; that the undertaking had been performed and that under the plan and agreement it must be operative before March 15, 1916, and would expire July 1, 1916; that to make the plan effective the properties of the Western Pacific must be sold and such steps must be taken as would allow the benefits of such agreement to be taken before July 1, 1916; and that if the plan should fail by reason of delay in foreclosure decree and sale the bondholders who are parties to the agreement will be liable in large sums for underwriting and expenses; that the plan contemplated heavy expenses for railroad extensions out of the funds to be raised, and that it will be unnecessary to carry on the receivership.

In critical examination of Contract B it must be borne in

mind that it was made contemporaneously with the mortgage of the Western Pacific and is to be construed accordingly. It had as a main purpose inducement to first mortgage bondholders, for it scarcely needs suggestion that with its existing provisions the bonds of the Western Pacific would bring higher prices in the financial markets than would an issue of bonds without such assurances.

There appear to be separable covenants in the whole contract. One wherein the Denver Company agrees to pay to the Trustee of the first mortgage bonds an amount which when added to the money actually paid by the Pacific Company is enough to pay the interest and also the sinking fund as may be due. Another where the Denver Company covenants to lend to the Western Pacific such an amount as will, when added to the earnings of the Western Pacific and without including interest on bonds, enable the Western Pacific to make its interest payment. As a way of effecting this, the Denver Company was to pay the amounts to the Western Pacific; the Western Pacific was to give its note to the Denver and then the Western Pacific would make the payments. Such a mode of procedure would result in this: The Western Pacific could not call on the Denver to make payments until it had applied its earnings to pay, but the secured mortgage bondholders could demand that the Denver pay, no matter what the conduct of the Western Pacific may have been respecting application of its earnings.

Another important general subject in Contract B is that of traffic. The Western Pacific was to secure advantage in traffic to the east via Colorado points. But we can pass the details of this feature of the contract because they are not vital to the questions here under consideration. It is clear, however, that the mortgage covered all the traffic rights of the Western Pacific as they are defined in Contract B. But the rights vested in the Trustee with respect to the enforcement of the suretyship of the Denver were reserved to the Trustee. With those several features of the contract which pertain directly to operation and traffic, the Trustee has less direct obligation, although it could terminate the traffic agreement under certain conditions. They were the property of the Western Pa-

cific and were to be carried out primarily at least by the railroad; but with the money matters affecting payments upon bonds the Trustee is to deal directly and is the party in interest and authorized to bring suit to enforce the rights accruing to it as beneficiary.

Contract B is in its obligations upon the Denver Company so explicitly kept alive for the benefit of the bondholders that provisions safeguarding and making certain the money payments are reiterated and the agreement shall (unless abrogated as therein expressly provided) "endure until all the first mortgage bonds of the Pacific Company shall be paid and shall run with the railways of the said railway companies, parties to it, into whosoever hands they may come."

It is not our intention to decide that the agreement made to run with the railways of the railroad companies created an equitable lien or charge in the nature of a lien which attached to the railway property of the Denver Company. The question whether or not it did create such a charge cannot and should not be adjudicated without affording to the Denver Company full opportunity to be heard. But we can safely say that it contains an obligation effective when the principal debt of the Western Pacific was not paid, and when default in payment of interest due by the Western Pacific occurred, and when the Denver Company neglected or failed to live up to the obligations imposed upon it.

The covenant of the Denver Company and of the Western Company to pay the Trustee such amounts as will with the amounts actually paid over for those respective purposes by the Pacific Company be sufficient to meet the interest on the bonds secured and the sinking fund requirements runs not solely to the Pacific Company; nor was its principal purpose to aid the Pacific Company to pay its obligations; nor is the Trustee a mere custodian for the Pacific Company; nor are the moneys when paid over to the Trustee assets of the Pacific Company in the same sense that its own earnings are. Far more reasonable a construction is it that under the covenants the Trustee is the covenantee of a trust fund for the benefit of the bondholders secured under the terms of the first mortgage, and that the Trustee when it shall receive monies

turned over to it under the covenants would apply them for the benefit of the bondholders.

Whether the covenants are strictly of suretyship as distinguished from guaranty are questions not appropriate for decision now. It is enough to say that whether one or the other in the strictest sense the Trustee has a right to sue the Denver Company for a breach of its covenants for the payment of interest and monies due, and may properly exercise such right in its own name for the benefit of the first mortgage bondholders.

The mortgage itself specially referring to Contract B in clear words says that in case of default in payment of interest there is the right in the trustee to sell at public auction all and singular the . . . obligations, contracts, agreements and interests of every description held by the trustee, or subject to the indenture, excepting only the right of the Trustee and of the holders of the bonds secured by the mortgage under Contract B, requiring the Denver Company to pay moneys to the Trustee and recover damages from the Denver Company upon default of such payments. This right and all rights secured by Contract B necessary for the enjoyment and enforcement of such rights shall remain in and survive to the Trustee for the benefit of the bondholders despite sale.

When this undertaking by the Denver Company to pay the debt of the Western Pacific if it has not been paid by that company was unperformed, the Trustee became a real party in interest, having full right to proceed by suit to protect the mortgage bondholders.

It is undoubtedly correct that when the Pacific Company made its first mortgage it pledged all the assignable rights it had under Contract B. The rights of the Trustee under Contract B are distinct from the rights of the Pacific Company. Those of the Pacific Company are included within the mortgage or pledge and can be sold under foreclosure. Those of the Trustee to enforce under B are not included, and, therefore, cannot be sold. They remain in and survive to the Trustee for the benefit of the first mortgage bondholders.

The District Court in California was not asked to give relief against the Denver Company; nor was it asked to

appoint receivers except to protect and preserve pending the litigation the property subject to the mortgage lien which did not include the right of the Trustee to enforce rights, herein involved, against the Denver Company, for it may be reiterated that was not to be sold under foreclosure but was to survive to the Trustee for the benefit of the bondholders.

It comes then to this: The Receivers had a right to the custody of only the property the subject-matter of litigation described in the amended complaint, and none other.

We also believe that the Trustee had a right to proceed with its dependent action in New York. *Guardian Trust Co. vs. Kansas City So.*, 146 Fed., 337. The Denver Company not being within this jurisdiction, and the District Court in California having no possession of any property except that of the Western Pacific in California covered by the mortgage, could not prevent the Trustee from bringing action *in personam* against the Western Pacific in a jurisdiction where that corporation might be found. Should judgment be obtained, doubtless satisfaction from the property in the hands of receivers could not be had without the aid of the court having authority over the receivers. But that is outside of this dispute.

The Pacific Company may have a right to proceed upon the liability of the Denver Company; but that need not be considered, because if it has, notwithstanding its own default, and if the receivers may enforce such right, remedy lies not in the present action, but in suit in the nature of specific performance or by other plenary action to compel the Denver to pay to the Trustee, that being the corporation designated to receive the money. We may assume there was an equitable lien given by Contract B upon the property of the Denver Company, and still it could not avail to defeat the right of the Trustee to foreclose without making the Denver a party to the foreclosure suit. The Denver Company has no property within this jurisdiction, and in the event of decree the court would be without authority to enforce a charge against its property.

We would not in any sense lessen the power of the court of equity to protect itself against being made an instrument of injustice. It may appropriately and should scrutinize mat-

ters brought before it and which are fairly within and directly related to the issues presented. But its jurisdiction is always limited to the subject-matter in the case before it. In *Reynolds vs. Stockton*, 140 U. S., 254, Justice Brewer approved part of the opinion of Chief Justice Beasley in *Munday vs. F'ail*, 34 N. J. Law, 418, who said:

"Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this, there are three essentials: First. The court must have cognizance of the class of cases to which the one to be adjudged belongs. Second. The proper parties must be present. And, Third. The point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that, because A and B are parties to a suit, that a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons, by becoming suitors, do not place themselves, for all purposes, under the control of the court, and it is only these particular interests which they choose to draw in question, that a power of judicial decision arises. If, in the ordinary foreclosure case, a man and his wife being parties, the Court of Chancery should decree a divorce between them, it would require no argument to convince every one that such decree, so far as it attempted to affect the matrimonial relation, was void; and yet the only infirmity in such a decree would be found, upon analysis, to arise from the circumstances that the point decided was not within the substance of the pending litigation."

The record shows that neither plaintiff nor defendant invoked the jurisdiction of the court as against the Denver

Company, and that no question was before it for adjudication except the right of the Trustee to foreclose the mortgage of the Western Pacific.

Under the usual rule of the Federal Courts if a case may be finally decided between the parties litigant without bringing others before the court who would, generally speaking, be necessary parties, such parties may be dispensed with if they are citizens of another State. This in no real sense conflicts with the principle that if those not before the court have rights so closely related to the issues between the parties in court that a final decision cannot be made between them without affecting the rights of those not before the court, then the court may not dispense with such persons. *California vs. So. Pac.*, 157 U. S., 229. The citation from *Beach on Equity Practice*, made by counsel in opposition to the plaintiff's appeal, is very pertinent:

"Necessary parties are those who have an interest in the controversy, but whose interests are separable from those of the parties before the court, and will not be directly affected by a decree which does complete and full justice between them. Such persons must be made parties if practicable in obedience to the general rule which requires all persons to be made parties who are interested in the controversy in order that there may be an end of litigation; but the rule in the Federal Courts is that if they are beyond the jurisdiction of the court, or if making them parties would oust the jurisdiction of the court, the case may proceed to a final decree between the parties before the court leaving the rights of the absent parties untouched, to be determined in any competent forum.

Indispensable parties are those who not only have an interest in the subject-matter of the controversy, but an interest of such a nature that a final decree cannot be made without either affecting their interests or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

It is argued that Equity Rule 37 gave to the court power to order that the Denver be made a party. It provides that:

" . . . Any person may at any time be made a party if his presence is necessary or proper to complete determination of the cause." Having shown that the Denver was not a necessary or proper party to the cause before the court the rule is inapplicable. *Vaughn vs. Black, et al.*, 29 N. W., 523; *Wind-sor vs. Ludinton*, 43 N. W., 867.

The Receivers are not necessary parties to the appeal from the injunction issued. The record fails to show that the court acted upon any motion for injunction made by them. On the contrary, the learned District Judge remarked that the Receivers stand indifferent as to how the litigation shall go. The order appealed from was made by the court, acting of its own motion, under the belief that it had power to control and direct the Trustee in respect to its actions in New York and elsewhere.

We may well doubt whether the petition in intervention has legal relevancy to the proceedings pending before us. But passing that point and regarding the theory of the application to intervene as resting upon the contention that Contract B creates an equitable lien upon the properties of the Denver Company superior to adjustment and refunding mortgages issued by the Denver Company, there is nothing authorizing the court to infer that the Trustee does not intend to do its duty and assert such a claim against the Denver Company after the foreclosure of the mortgage on the properties of the Western Pacific. *Shaw vs. Railroad Company*, 100 U. S., 605. It is inconceivable that the Trustee of so important a trust as is conferred upon the Equitable Trust Company will incur the liability which will come to it if it should be recreant in the performance of its obligations to enforce every right conferred by Contract B for the protection of the first mortgage bondholders. We cannot here hold that an election by the Trustee to enforce any rights that the mortgage bondholders may have under Contract B against the Denver Company after foreclosure, indicates infidelity to its trust. Possible controversies which may arise if it should be decided that Contract B creates an equitable lien cannot be disposed of in this litigation. So plain do we think it that a failure to assert the claim of the Trustee against the Denver Company on Con-

tract B and to reduce any such claim to judgment prior to foreclosure and decree is not fraudulent, that we need not say anything more upon the point. And as we cannot see that a non-assenting bondholder in the plan of reorganization can be deprived of his full right to insist that an action be brought to enforce Contract B, we fail to see how he can be injured by permitting the foreclosure proceeding to proceed. We are satisfied, however, that the District Court in its discretion has full power to make an order concerning an upset price upon the sale, if such procedure should be deemed desirable by the court; of course, hearing may well be accorded to these petitioners and such others as may appear to have any interest in the proceeding for the purpose of aiding the court in ascertaining and determining what the upset price should be.

Summarizing the principal points we conclude:

The Receivers not being necessary parties to this appeal the motion to dismiss the appeal must be denied.

The Trustee, Equitable Trust Company, had a right to proceed to foreclosure as it prayed against the Western Pacific.

The Denver Company was not a necessary or proper party to such foreclosure proceedings, and the Denver Company not being within the jurisdiction of the Court and the Court having no custody of its property, no order could be made compelling it to interplead in the foreclosure suit.

The Trustee had a right to begin action against the Denver Company in New York to enforce any rights accruing under Contract B to the bondholders, and the District Court in California had no power to interfere with the Trustee in proceeding with such action.

That part of the order which would compel the Denver Company and the Missouri Pacific Company to become parties to interplead having been in excess of jurisdiction, writ of prohibition is properly invoked. *U. S. vs. Mayer*, 235 U. S., 67; *McClellan vs. Carland*, 217 U. S., 268; *In re Rice*, 155 U. S., 396.

We shall deny the petition for a writ of mandamus because every presumption is that the District Court being advised of the views of this Court, will proceed to give the parties full measure of relief.

The order appealed from is reversed.
Petitioner's application for writ of prohibition is granted.
The application for writ of mandamus is denied.

ENDORSED: Opinion filed March 29th, 1916. F. D.
Monckton, Clerk U. S. Circuit Court of Appeals for the
Ninth Circuit.

United States
Circuit Court of Appeals
For the Ninth Circuit.

IN THE MATTER OF THE PETITION OF THE
EQUITABLE TRUST COMPANY OF NEW
YORK, AS TRUSTEE, FOR A WRIT OF MAN-
DAMUS, TO BE ISSUED AND DIRECTED TO
THE HONORABLE WILLIAM C. VAN FLEET,
JUDGE OF THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF CALIFORNIA, SECOND DIVISION.

PETITION FOR WRIT OF MANDAMUS.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

In the Matter of the Petition of the **EQUITABLE TRUST COMPANY** of New York, as Trustee, for a Writ of *Mandamus*, to be Issued and Directed to the Honorable **WILLIAM C. VAN FLEET**, Judge of the United States District Court, for the Northern District of California, Second Division.

Petition for Mandamus.

To the Honorable **WILLIAM B. GILBERT**, Presiding Judge of the United States Circuit Court of Appeals, for the Ninth Circuit, and to the Judges of said Court:

The petition of the Equitable Trust Company of New York, a corporation, organized and existing under the laws of the State of New York, respectfully sets forth:

On the 29th day of March, 1916, there was pending in the District Court of the United States, for the Northern District of California, Second Division, a certain action for the foreclosure of the First Mortgage of the Western Pacific Railway Company, and the appointment of receivers for the property of said Railway Company covered by such First Mortgage *pendente lite*, in which the Equitable Trust Company of New York, as Trustee, was plaintiff, and the Western Pacific Railway Company, Boca and Loyaltan Railroad Company, Chester L. Hovey, as Receiver of Boca and Loyaltan Railroad Company, and Mercantile Trust Company of San Fran-

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cisco, as Trustee, were defendants, and Central Trust Company of New York, as Trustee, was intervening defendant. The jurisdiction of said Court over said cause was invoked solely on the ground of diversity of citizenship.

There was pending in said court at said time and in said action a petition on the part of the Savings Union Bank & Trust Company for leave to intervene in said cause.

Various controversies had arisen in said cause between the Judge of said court and the plaintiff, certain of which said controversies were presented to this Court in certain original proceedings brought therein, and entitled as follows: *Ex parte* Equitable Trust Company of New York, as Trustee of the First Mortgage of the Western Pacific Railway Company, plaintiff in the action of Equitable Trust Company of New York, as Trustee, against the Western Pacific Railway Company; In the Matter of the Petition of the Equitable Trust Company of New York, as Trustee, for a Writ of *Mandamus* to be issued and directed to Honorable William C. Van Fleet, Judge of the District Court of the United States, for the Northern District of California, and to said District Court; In the Matter of the Appeal of the Equitable Trust Company from the Order Issuing the Injunction, dated February 21, 1916.

In said proceedings for Prohibition and *Mandamus* John S. Partridge and Garret W. McEnerney appeared as counsel for the said Judge, and on the hearing of the appeal the said Partridge and McEnerney appeared as counsel for the receivers,

theretofore appointed by said Court in said suit of Equitable Trust Company of New York as Trustee against Western Pacific Railway Company and others.

On or about the 14th day of March, 1916, your petitioner was informed that the Judge of the United States District Court, for the Northern District of California, Second Division, to wit, the Honorable William C. Van Fleet, was conducting, and causing to be conducted proceedings in relation to said cause in such manner that it seemed probable that the said Judge entertained a personal bias and prejudice against your petitioner. Immediately upon the receipt of such information by your petitioner, your petitioner sent to San Francisco, Lyman Rhoades, one of the vice-presidents of your petitioner, and instructed the said Lyman Rhoades to investigate the proceedings being conducted in said cause in California, and to ascertain to the best of his ability whether or not said Honorable William C. Van Fleet did in fact entertain a personal bias and prejudice against your petitioner; that said Lyman Rhoades arrived in San Francisco on the 18th day of March, 1916, and proceeded thoroughly to investigate and to ascertain to the best of his ability whether or not the said Honorable William C. Van Fleet entertained a personal bias and prejudice against your petitioner as plaintiff in the said action of the Equitable Trust Company of New York, as Trustee, against the Western Pacific Railway Company. Said Lyman Rhoades, after such investigation, reached the conviction that

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said Judge did entertain a personal bias and prejudice against your petitioner, but, at the time such conviction was reached by said Lyman Rhoades, there was under submission in this court, to wit, the United States Circuit Court of Appeals, for the Ninth Circuit, the petitions for Mandate and Prohibition hereinbefore mentioned. Said Lyman Rhoades then caused to be prepared an affidavit, embodying his conclusion that the said Honorable William C. Van Fleet entertained a personal bias and prejudice against your petitioner, and a personal bias and prejudice in favor of other parties interested in said cause, and stating the reasons for such conclusion, but that said Lyman Rhoades did not desire that said affidavit should be filed until after the question of the propriety of filing the same had been presented to the president and executive committee of the Equitable Trust Company of New York. Counsel for your petitioner were of the opinion and advised your petitioner that it was proper and right that the question of filing said affidavit should be presented both to the Equitable Trust Company of New York and to the Reorganization Committee of the First Mortgage Bondholders of the Western Pacific Railway Company, and were also of the opinion and advised your petitioner that such affidavit should not be filed, unless the filing thereof became unavoidable, until after the decision of this Honorable Court in the matters then pending before it;

On the 20th day of March, 1916, the said Honorable William C. Van Fleet announced that he would

make no orders and take no proceedings in the said action of the Equitable Trust Company of New York, as trustee, against the Western Pacific Railway Company, until after this Honorable Court determined the matters then pending before it; and forthwith, upon such announcement being made, the said Lyman Rhoades returned from San Francisco to New York, arriving in New York on or about the 26th day of March, 1916. As soon as said Lyman Rhoades arrived in New York he caused to be there prepared an affidavit, stating explicitly the fact that the said Honorable William C. Van Fleet, Judge of the District Court of the United States, for the Northern District of California, Second Division, entertained a personal bias and prejudice against your petitioner, and in favor of other parties interested in said cause, and setting forth and showing the reasons for his belief that such was the fact.

Thereafter, and on the 29th day of March, 1916, said Lyman Rhoades presented such affidavit to the executive committee of said Equitable Trust Company, and requested their instructions as to whether the same should be filed. The first meeting of the executive committee of the Equitable Trust Company of New York which took place after the said return of said Lyman Rhoades from San Francisco to New York was on said 29th day of March, 1916.

Prior to said meeting of said executive committee the Reorganization Committee of the First Mortgage Bondholders of the Western Pacific Railway Company had requested that said Equitable Trust Com-

pany should file such affidavit in said cause, in the event that said Trust Company should be of the opinion that the said Judge entertained a personal bias and prejudice against said Trust Company, and should be further advised by counsel that the filing of said affidavit was proper and necessary for the protection of the interests of the First Mortgage Bondholders of the Western Pacific Railway Company.

The executive committee of the Equitable Trust Company, being of the opinion that the making and filing of such affidavit was proper and necessary, and that the same constituted one of the duties devolving upon it by virtue of its trust, and being advised by its counsel that the filing of said affidavit was proper and necessary for the protection of the interests of the First Mortgage Bondholders of the Western Pacific Railway Company, duly directed that such affidavit be made and filed; that forthwith the said Lyman Rhoades made said affidavit, and forwarded the same to San Francisco, said affidavit having been made in the city of New York on the 29th day of March, 1916, and before the Equitable Trust Company, or said Lyman Rhoades, had been informed that this Honorable Court had delivered its opinion upon the matters then pending before it; that said affidavit was forthwith mailed to Jared How, San Francisco, counsel for the Equitable Trust Company of New York, and was received by said Jared How in due course of mail, and was, on the first opportunity after the same was received, viz., on Monday, the 3d day of

April, 1916, at forty minutes past nine o'clock A. M., filed in the office of the clerk of the United States District Court for the Northern District of California, Second Division; that at the time of such filing of such affidavit there was presented to said clerk by said Jared How a form for an order in the usual form, directing that the fact of the filing of such affidavit should be entered on the records of the court, and that an authenticated copy thereof should be forthwith certified to the Senior Circuit Judge for said Circuit then present in the Circuit; that said clerk was requested, at the time said affidavit was filed, to take the same forthwith to the said Judge, together with said form for an order; that said Judge, upon said affidavit and form for an order being presented to him by said clerk, refused to receive the same, and directed the clerk to return the same to counsel for your petitioner, and to state to him that proceedings would have to be taken in open court, and the affidavit there presented.

Accordingly and in compliance with the requirements of said Judge, counsel for your petitioner, at the hour of ten o'clock A. M., of said 3d day of April, 1916, presented said affidavit to said Judge in open court, together with said form for an order; that the said Judge requested that said affidavit be read by counsel for the petitioner, and said affidavit was in open court presented to and read to said Judge by counsel for your petitioner; that counsel for your petitioner thereupon moved and requested the Court to make an order that an authenticated copy of the said affidavit should be

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forthwith certified to the Senior Circuit Judge of said Circuit then present in the Circuit, in accordance with the provisions of sections 20 and 21 of the Federal Judicial Code. The affidavit hereinbefore referred to, together with a copy of the form for an order presented at the time the same was filed, is hereunto annexed, marked Exhibit I, and made a part hereof. A full transcript of the proceedings had at the time of the reading of said affidavit is hereto attached, marked Exhibit II, and made a part hereof.

That, as appears in said transcript of proceedings, said Court refused at said time to make such order, and continued the matter until Wednesday, the 5th day of April, 1916.

On the 5th day of April, 1916, the said Judge declared that he desired the advice of counsel concerning his duty in the premises, and stated that he had requested Garret W. McEnerney and John S. Partridge to advise him concerning his duty in the premises, as his counsel. A full transcript of the proceedings taking place on said 5th day of April, 1916, is hereto attached, marked Exhibit III, and made a part hereof. That at the request of said counsel for the Judge, and over the protest and objection of counsel for your petitioner, said Judge postponed until Friday, the 7th day of April, 1916, at the hour of two o'clock P. M., any determination upon the subject.

Thereafter, on Friday, the 7th day of April, 1916, at the hour of two o'clock P. M., said Judge filed in the above-entitled cause an affidavit, a copy of

which is hereto attached, marked Exhibit IV, and made a part hereof. To the filing or consideration by said Judge of said affidavit your petitioner objected, and excepted to the ruling of said Judge permitting the same to be filed.

On the same day John S. Partridge, one of counsel for said Judge, filed in said cause an affidavit, a copy of which is hereto attached, marked Exhibit V, and made a part hereof. To the filing or consideration by said Judge of such affidavit counsel for your petitioner duly objected, and to the ruling allowing the same to be filed your petitioner excepted.

In the affidavit filed by said Judge it was declared: "That it is the intent of the affiant to proceed forthwith, and with all possible expedition, to the hearing of any further matters that may be involved in said cause, looking to the speedy entry of a decree of foreclosure and sale, and winding up of the receivership; that affiant is satisfied in the state of his own mind that affiant in all matters and things in connection with said action can and will, and intends to do equal and exact justice to all parties who may be interested therein."

After the filing and reading of said affidavit containing said statement, the said Honorable William C. Van Fleet proceeded to entertain advice from Garret W. McEnerney and John S. Partridge, his counsel, regarding his duty in the premises, which advice took the form of arguments upon the merits of the affidavit of Lyman Rhoades above referred to. Garret W. McEnerney, at the conclusion of his said

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argument, which said argument was delivered by him as counsel for said Judge, and as advisor of said Judge, stated and declared as follows:

“Now, he has also spoken about this affidavit. Mr. How’s theory on the 6th of March, and Mr. Rhoades’ theory on the 29th of March, are a little different, and he has referred to it now, and quoted from memory what Mr. Rhoades did say, but I have it here. In paragraph 7 Mr. Rhoades says: ‘It is manifest that the interest of the minority bondholders is to compel the majority bondholders to pay the highest possible up-set price for the mortgage property.’ That doesn’t mean simply minority bondholders who have come to court, but all minority bondholders who haven’t gone into the reorganization. Now, then, if it is to the manifest interest of the minority bondholders to get a high up-set price, what is the interest of the majority bondholders? The interest of the majority bondholders is to obtain the mortgaged property for the lowest possible price—so the minority wants the highest up-set price, and the majority wants the lowest up-set price. Now what does the Trustee want? ‘The duty of the Trustee is to do everything fairly possible to compel the majority bondholders to pay the full and true value of the property at the time of sale, all elements of value and all qualifying factors being considered, no more and no less, and this duty the Trust Company is prepared and intends fully to perform. As will appear hereinafter, said Judge has constituted himself the special guardian and champion of said minority bondholders.’ Now, let us see if we under-

stand this position. The minority bondholders want the highest up-set price; the majority bondholders want the lowest up-set price; the Trustee wants to compel the majority bondholders to pay the true value of the property, all elements of value and all qualifying factors being considered, no more nor no less. So we have three groups of persons present at the fixing of the up-set price—the minority bondholders wanting it low—the majority bondholders wanting it high; the Trustee, over in the corner, wanting to compel the majority bondholders to pay the full and true value of the property. Now, who are the majority bondholders? They are the Reorganization Committee, and it is so stated in paragraph 5 of Mr. Rhoades' affidavit (quoting from the affidavit): 'It is, and at all times has been the desire of the said bondholders that the property of the Railway Company shall at once be sold, and if a proper price cannot otherwise be realized therefor, that the same shall be purchased in the interest of such of the bondholders as may join in the plan of the reorganization.' So that, after all, the minority bondholders want a high price—the Reorganization Committee, on the other side, wants the lowest possible price, and the Trustee, over in the corner, wants to compel the Reorganization Committee to pay the true value of the property at the time of sale, all elements of value and all qualifying factors being considered. And who represents the Trust Company? Alvin W. Krech is the president of the Equitable Trust Company, and Lyman Rhoades is the vice-president of the Trust Company, and, as he says in

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his affidavit, 'and particularly in charge of the matter of executing the trusts vested in said Trust Company'—'in charge of the execution of the trusts vested in the Trust Company by and as Trustee under the First Mortgage of the Western Pacific Railway Company.' So now we have the minority bondholders wanting a high up-set price; the majority bondholders wanting the lowest possible price, and Mr. Krech and Mr. Rhoades, over in the corner, with the duty upon them to compel the full and true value of the property on the sale, all elements of value and all qualifying factors being considered, no more and no less. But who will Mr. Krech and Mr. Rhoades, over in that corner, wanting a full value of the property, talk to with a view to getting that price? Why, Mr. Krech, as president of the Reorganization Committee, and Mr. Rhoades, as secretary of the Reorganization Committee, who want it for the lowest possible price, and I wonder whether Mr. Rhoades affidavit is made as the vice-president of the Trust Company, or as the secretary of the Reorganization Committee?

Mr. HOW.—I am at a loss to understand what that argument is for, unless to foment and create prejudice.

Mr. McENERNEY.—It is to tell the truth about the situation out of Mr. Rhoades' affidavit.

Mr. BOWIE.—Not to appear for the intervenor?

Mr. McENERNEY.—No, sir; I don't represent the intervenor, Mr. Bowie, or anybody who has any interest in the Western Pacific properties, near or remote."

Said remarks above quoted were made by the counsel for the said Judge, in the presence of the said Judge, in the guise of advice to the said Judge, and the Judge did not in any way rebuke said counsel, or object to such argument, remarks or advice, or repudiate the same in any manner, shape or form, but, on the contrary, said Judge had theretofore declared in reference to the proceedings then being conducted before him: "Of course, I am acting under the advice of counsel."

In the said affidavit of said Judge there is set forth a certain letter, purporting to be dated March 8, 1916, addressed to Jared How, and signed by John S. Partridge, said letter being set forth on pages 13 and 14 of said affidavit. Immediately preceding said letter said affidavit stated: "That in connection with the allegations in the affidavit that John S. Partridge declined to waive the issuance of citation upon appeal, and stipulate that said appeal might be heard on the 16th day of March, affiant states that John S. Partridge has shown to affiant a copy of a letter sent to Jared How, solicitor for the Trust Company, in words and figures as follows." Then follows the letter, in which letter the said John S. Partridge, as counsel for the receivers, stated: "In regard to the first stipulation" (a stipulation waiving service of the order allowing appeal, notice of appeal and bond on appeal), "I do not see how it is possible by any such paper to inaugurate an appeal or to confer jurisdiction upon the Circuit Court of Appeals, and for that reason, and that reason alone, I beg to be excused from signing the same."

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“In regard to the second stipulation” (the stipulation referring to the record on appeal), “if you take an appeal in the manner prescribed by law, I shall certainly facilitate the establishing of the record in any manner that will fairly present the whole matter to the Court of Appeals, and it seems to me that the second stipulation presented will fairly do this. This, however, is, of course, subject to examination and verification, and suggestions of any other papers which it may seem necessary or proper should constitute a part of the record.”

Said affidavit contains nothing further upon said matter than as above stated; and the direct and necessary implication from such affidavit is that, as stated in the letter of March 8, 1916, incorporated in such affidavit, the receivers were willing to enter into stipulations and waive citation necessary for the presentation of the appeal on March 16, 1916, after such appeal had been perfected. Such, however, was not the fact, for, after receiving said letter, and on the 8th day of March, 1916, Jared How, counsel for your petitioner, obtained from the Honorable William B. Gilbert, Presiding Judge of the United States Circuit Court of Appeals, an order allowing the appeal, and filed the same, together with an assignment of errors, in the office of the clerk of the United States District Court, for the Northern District of California, Second Division. Said Jared How having ascertained that if citation were issued thirty days would have to elapse before the persons to whom the citation was directed could be required to appear, thereupon determined not to have citation

issued, and forthwith presented to said John S. Partridge, counsel for said receivers, a form for a stipulation waiving citation, consenting to the hearing of the appeal on the 16th day of March, 1916; and also relating to the record on appeal. Said John S. Partridge, on said 8th day of March, 1916, after he had been advised by Jared How that the said appeal had been allowed, and after he had been requested by said Jared How to make and enter into such last-mentioned stipulation, wrote and transmitted to Jared How a letter, of which the following is a copy:

“San Francisco, Cal., March 8, 1916.

Mr. Jared How,

Mills Building,

San Francisco, Cal.

Dear Sir:

After consultation with Mr. McEnerney, I have decided that it would not be advisable to enter into the proposed stipulation. I, therefore, return it to you herewith.

Yours very truly,

(Signed) JOHN S. PARTRIDGE.”

JSP/D.

The stipulation referred to in said letter and returned therewith was the form of stipulation waiving citation last above mentioned. This letter, not mentioned in the affidavit of said Judge, was written and delivered after the letter quoted in said affidavit.

*The cause of action with which said Judge is proceeding is for the foreclosure of a mortgage securing

*Clerk's Note: See page 168 for amendment to Petition, allowed by order of Court entered May 3, 1916.

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the payment of Fifty Million (\$50,000,000) Dollars of bonds of the Western Pacific Railway Company. Said Judge intends to and will in said proceeding fix and determine the up-set price for which the said property is to be sold; that said Judge will also pass upon and determine the question of the right of the petitioner, Savings Union Bank & Trust Company, to intervene in said cause. Said Judge will also in said cause pass upon and determine the compensation to be paid to John S. Partridge, counsel for the receivers and counsel for the said Judge, as herein stated.

A Plan and Agreement for the reorganization of the properties of the Western Pacific Railway Company has been framed, which Plan holders of approximately Forty-three Million Nine Hundred Thousand (\$43,900,000) Dollars par value of bonds have joined in and agreed to carry out, and holders of approximately Two Million Five Hundred Thousand (\$2,500,000) Dollars par value of bonds have agreed to co-operate in carrying out; that the said Plan and Agreement was declared operative on the 15th day of March, 1916; that such Plan and Agreement contemplates the purchase at foreclosure sale in the interest of such bondholders as shall be willing to participate therein of all the properties covered by such First Mortgage, and the issue by the purchaser forthwith of Twenty Million (\$20,000,000) Dollars par value of bonds to be secured by a first lien upon the properties so purchased. In order that such Plan and Agreement might be carried out according to its terms, it was essential that a fair market for such bonds, when issued and offered for sale should

be assured. To that end, an underwriting syndicate has been formed, and has agreed to insure the sale of such bonds at a price and upon terms which are believed to be more favorable than can again be secured, and by the terms of such underwriting agreement the underwriting syndicate is entitled to call for the bonds, the sale of which is insured by it, on or before July 1, 1916. If, through delay in the entry in said suit of your petitioner against Western Pacific Railway Company of a decree of foreclosure and sale and the enforcement of such decree it shall become impossible to carry out such Plan and Agreement prior to July 1, 1916, so that the benefit of such underwriting may be availed of, such holders of such bonds who shall have joined therein will be liable to a charge of over One Hundred Fifty Thousand (\$150,000) Dollars, and in other respects will sustain irreparable loss and injury, for the reason that it is extremely doubtful whether a new underwriting can be obtained on terms as favorable as those now existing.

That your petitioner is without remedy by appeal, and there is no means or relief open to your petitioner unless by a Writ of Mandate of this Court.

WHEREFORE, your petitioner prays that a rule may be made and may issue from this Honorable Court, directing the Honorable William C. Van Fleet, Judge of the United States District Court, for the Northern District of California, Second Division, to show cause before this Court why a Writ of *Mandamus* shall not issue commanding him to enter an order in said cause that an authenticated copy of

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such affidavit shall be forthwith certified to the Senior Circuit Judge for this Circuit then present therein.

And your petitioner does further pray that, pending the hearing and disposition of said order to show cause, said Judge be restrained and enjoined from taking any steps or proceedings in said cause, and for such other and further relief as to this Honorable Court may seem just and meet. And your petitioner will ever pray.

MURRAY, PRENTICE & HOWLAND,
JARED HOW,
Counsel for Petitioner.

State of Oregon,
County of Multnomah,—ss.

I have read the foregoing petition by me subscribed. The facts stated therein are true.

JARED HOW.

Subscribed and sworn to before me this tenth day of April, 1916.

[Seal]

FRANK L. BUCK,
Notary Public in and for the State of Oregon.
My commission expires November 4, 1916.

**Exhibit I [to Petition for Mandamus—Affidavit of
Lyman Rhoades of Personal Bias and Prejudice,
Filed Pursuant to Section 21 of the Judicial
Code].**

*In the District Court of the United States, in and for
the Northern District of California, Second Di-
vision.*

No. 169—IN EQUITY.

THE EQUITABLE TRUST COMPANY OF NEW
YORK, as Trustee,

Plaintiff,

vs.

WESTERN PACIFIC RAILWAY COMPANY
et al.,

Defendants.

State of New York,

City and County of New York,—ss.

Lyman Rhoades, being first duly sworn, deposes
and says:

I am one of the vice-presidents of The Equitable Trust Company of New York (hereinafter called also the Trust Company), being The Equitable Trust Company of New York, as Trustee, named as plaintiff in the above-entitled action. I make this affidavit for and on behalf of said The Equitable Trust Company of New York, and of said Trust Company, as such trustee and plaintiff. I am in charge of the Trust Department of said Trust Company, and par-

ticularly in charge of the matter of executing the trusts vested in said Trust Company, and I am in charge of the execution of the trusts vested in said Trust Company by and as Trustee under the First Mortgage of the Western Pacific Railway Company (hereinafter sometimes called the Railway Company) and under that certain contract B hereinafter referred to.

II.

The above-entitled cause is a suit for the foreclosure of the First Mortgage of the Railway Company, and is now pending in the United States District Court, for the Northern District of California, and in the second Division of said court, and the Hon. William C. Van Fleet is the regularly presiding Judge in said division and cause, and has exclusive control of all matters arising in said cause. Said William C. Van Fleet, Judge of said court before whom said cause is pending, has a personal bias and prejudice against The Equitable Trust Company of New York, the plaintiff in said cause above entitled. Said Judge has a personal bias and prejudice against The Equitable Trust Company of New York, as trustee and as plaintiff in the above-entitled cause. Said Judge has a personal bias and prejudice in favor of Frank G. Drum and Warren Olney, Jr., as Receivers of Western Pacific Railway Company appointed in said action, and John S. Partridge, their counsel, who have by their actions, hereinafter recited, and under the authority, or with the acquiescence of the Court, become parties to various con-

troversies which have arisen in said cause, and to which the Trust Company is also a party. Said Judge has a personal bias and prejudice in favor of the Savings Union Bank & Trust Company, which said Savings Union Bank & Trust Company (hereinafter called the "Savings Union") has sought to intervene in said cause, and to become a party thereto.

The facts and reasons for my belief that such personal bias and prejudice exist are as follows:

III.

There are pending in said cause the following controversies and matters to which the Trust Company is a party.

1. A proceeding initiated by said Judge upon his own motion to enjoin the Trust Company from prosecuting a certain suit by it commenced in the United States District Court, for the Southern District of New York, against The Denver & Rio Grande Railroad Company (hereinafter called the Denver Company) and others. This proceeding is being prosecuted by said Receivers and their counsel at the instance of said Judge, and defended by the Trust Company.

2. An application by the Trust Company, as complainant herein, for a decree of foreclosure and sale of the property of the Railway Company subject to said First Mortgage. This application is opposed by said Receivers and their said counsel. Upon the hearing of said application, if the Court shall hear the same, the question of what, if any, up-set price

shall be fixed as the minimum price to be accepted for the property to be sold, will necessarily arise.

3. A proceeding initiated by the Judge upon his own motion to bring said Denver Company into this cause as a party defendant, and to determine in this said cause its liability under a certain agreement dated June 23, 1905, between The Denver & Rio Grande Railroad Company and the Rio Grande Western Railway Company (predecessors and constituent corporations of said Denver Company), the Railway Company and the Trustee under its said First Mortgage, commonly known and herein called "Contract B," and, if possible, to enforce the same. (Copies of said Contract B have been filed in this cause and are part of the record therein, and I pray leave to refer to the same as if a full copy thereof were incorporated in this affidavit.) Such liability arises from an obligation upon the part of the Denver Company to pay to the Trust Company for the holders of said First Mortgage bonds the difference between the amount due from the Railway Company for interest and sinking fund payable upon its said First Mortgage bonds, and the amount actually paid by the Railway Company on account of the same. This proceeding is being conducted by the Receivers and their counsel by direction of the Court, and is opposed by the Trust Company.

4. An application of said Savings Union to be permitted to intervene in said cause, in order that it may participate in the prosecution thereof, and particularly of said claim against the Denver Company,

and oppose the entry of any decree in said cause until said claim be disposed of, and when a decree shall be entered, to procure the fixing of the largest possible up-set price. The granting of said application is opposed by the Trust Company.

IV.

Holders of a large amount (namely, about \$43,-900,000 principal amount, out of \$50,000,000 outstanding) of Western Pacific First Mortgage bonds have joined in forming a Reorganization Committee, and adopting a Plan and Agreement for the reorganization of the Railway Company. Another committee has been formed in Amsterdam, Holland, by holders of such First Mortgage bonds, principally resident in Holland, and represents, as I am informed and believe, about \$3,000,000 principal amount, of such bonds; and while said committee has not as yet acted in approval or disapproval of said plan, said committee, in the matters which have arisen in connection with the suit brought by the Trust Company in the United States District Court for the Southern District of New York and the attempt of said Judge to prevent the prosecution thereof and matters consequent thereon, has acted in co-operation with said Reorganization Committee. This plan, in the opinion of the Trustee, is a proper and fair plan. All bondholders have been and are at liberty to join therein, and said Plan, in the opinion of the Trustee, in no way tends to prejudice the rights or interests of such bondholders as do not join therein. Said First Mortgage provides that the Trustee, in all pro-

ceedings under the mortgage, shall obey the directions of the holders of a majority of said bonds, and the Trustee is co-operating with, and as in duty bound, is receiving and obeying the instructions as to such proceedings from said Reorganization Committee, as the holders of a majority in amount of said bonds. It has not, however, received any instructions, or taken any proceedings, which operate to the advantage of one set of bondholders as distinguished from another. The Judge, nevertheless, identifies the Trust Company with the Reorganization Committee, and, as appears from a colloquy between the Judge and counsel, which took place in open court on March 6, 1916, apparently regards the Trust Company as in reality not acting for the bondholders who have not joined in said plan, and as the representative solely of the bondholders who have joined therein. On that occasion, the Judge said, referring to the Trust Company's application for a decree of foreclosure and sale herein, to be made for the benefit of all of the holders of said First Mortgage bonds:

“ * * * Now, the Court unquestionably proposes to have such light upon the situation as will enable it to proceed in accordance with the rights of all the parties here concerned, because the Court is not here alone sitting to adjudicate rights of any particular lot of bondholders, or section of bondholders; it must protect them all, the smallest with the largest, the greatest with the least. * * *

The COURT.—The Court is in this position: It is just as much bound, as I have indicated, to protect the rights of those bondholders who have seen fit to stand out and not subscribe to the reorganization scheme as those who have subscribed. * * * Now, they are before the Court; this Court is obligated to protect their rights equally with that of any body of bondholders who may desire a different course to be pursued."

In making this statement, and other like statements, the Judge clearly implied that the Trustee was acting only in the interest of bondholders who had joined in said plan of reorganization, and was not caring for all of the bondholders, as it is in duty bound to do, and as in fact it is doing.

Counsel for the Judge, upon the hearing on March 16th and 17th, 1916, of applications to the Circuit Court of Appeals, for the Ninth Circuit, for writs of prohibition and mandate, intended to prevent the Judge's taking in this cause said proceedings against the Denver Company and to compel the entry of a proper decree of foreclosure and sale, which applications were made by the Trust Company, clearly intimated in argument, as I am informed by counsel for the Trust Company there present, that the Trustee could not be trusted, in the opinion of the Judge, to act fairly and impartially in protecting the interests of said minority bondholders, as well as the interests of the majority bondholders.

V.

The bondholders who have joined in the formation

of the Reorganization Committee and the Trustee have been advised by their respective independent counsel, and are of the opinion, that the obligations under Contract B of The Denver Company to the Trustee and the bondholders, in respect to the making of interest and sinking fund payments, are not subject to said First Mortgage, and in this suit for the foreclosure thereof no decree is sought for the sale or other disposition of said last-mentioned obligations. It is, and at all times has been, the desire of the said bondholders (hereinafter called the majority bondholders) that the property of the Railway Company shall at once be sold, and if a proper price cannot otherwise be realized therefor, that the same shall be purchased in the interests of such of the bondholders as may join in said Plan of Reorganization, and shall be improved and operated for their benefit as stockholders of a new corporation, to be formed for the purpose. It is also their desire and intention, if so permitted, that the said claim against the Denver Company shall survive in the hands of the Trust Company, as Trustee under Contract B, in order that such new corporation may, if possible, by negotiations with the Denver Company, realize therefrom, so far as such claim pertains to the bonds of said majority bondholders, the greatest possible advantage to said new corporation and its stockholders (now said bondholders), it being the purpose of the majority bondholders to pursue the prosecution of said claim against the Denver Company, so far as it pertains to their said bonds, only

in event that it shall prove impossible by means of negotiation to make a thoroughly satisfactory settlement thereof in the interest of such bondholders; but otherwise to insist upon the enforcement of the same. The majority bondholders believe, and the Trustee agrees, that the prosecution of said claim in court will almost certainly result in the insolvency and the appointment of receivers for the Denver Company, and that in consequence the entire benefit of said claim will be lost, unless the bondholders are prepared to protect themselves in the course of a reorganization of the Denver Company.

VI.

As a consequence of the foregoing considerations, the Trustee, acting as Trustee of the trust created by said Contract B, as it was advised that it was its right and duty to do, at the request of the majority bondholders (represented by a protective committee, which was the predecessor of the Reorganization Committee, as the representative of a majority in amount of said bonds, and was composed of the same individuals), in May, 1915, filed in the United States District Court, for the Southern District of New York, a bill in equity, denominated as a bill ancillary to the bill of complaint in said cause pending in this court, and procured the appointment as Receivers of the Railway Company in said District the same persons who had been appointed Receivers thereof in this Northern District of California, and thereupon filed in said United States District Court, for the Southern District of New York, a so-called depend-

ent bill, whereby the Trust Company sought as ultimate relief the enforcement of the said obligations of the Denver Company to all of said bondholders, but incidentally and primarily the enjoining of individual bondholders, whose bonds, or some of them, bore direct guaranties of interest payments endorsed thereon by the Denver Company, from enforcing said direct guaranties, inasmuch as the result of such enforcement would be to impair or impede the enforcement of the obligations of Contract B which run in favor of all holders of said Western Pacific First Mortgage bonds. (Such direct guaranties are endorsed upon only a portion of said bonds.) Upon the institution of said suit in New York, said Judge displayed resentment at the Trust Company's action in commencing the same without his permission. At the same time, both said Receiver, Frank G. Drum, and said counsel for said Receivers, John S. Partridge, were greatly disturbed, and stated, in substance, that they felt affronted by the action of the Trust Company, and expressly stated, in substance, that the action of said Trust Company was an affront to said Judge, and to themselves. Upon an application made shortly thereafter by said Receivers for instructions as to whether they should institute suit for the enforcement of the Denver Company's said obligations, said Judge of his own motion issued an order, directed to the Trust Company, to show cause why it should not be enjoined from prosecuting or taking other proceedings in said suit pending in New York. And subsequently said

Judge rendered an opinion, and of his own motion caused to be entered an order enjoining the Trust Company from taking any further proceedings in said cause, and likewise, although no application therefor had been made by anybody, enjoining the Trust Company from prosecuting said obligations of the Denver Company in any court save in the court of said Judge, or taking any action with respect to said obligations of the Denver Company, or which might affect the same, without the permission of said Court, that is to say, of said Judge. Subsequently, and upon the hearing of an appeal from said order taken by the Trust Company to the Circuit Court of Appeals for the Ninth Circuit and of said applications for writs of prohibition and *mandamus* above mentioned, said Judge, through his counsel, filed motions to dismiss all of the same, and demurrers to the petitions for such writs, and returns to the alternative writs, and thereby alleged and claimed that said proceeding to enjoin the Trust Company as above stated was in reality a proceeding in contempt, and that said Trust Company had been in contempt of said Judge and his said court, and has in effect, by the order of said Judge, been adjudged so to be in contempt. And said Judge and his said counsel have clearly intimated in connection with said proceedings for injunction, and for said writs of prohibition and *mandamus*, that said Judge and his said Receivers and counsel believe that the Trust Company instituted said New York suit for the purpose of evading the jurisdiction of the Judge, and that the Trust Company and the majority bondholders are

unwilling to confide their interests under said contract to the decision of said Judge, and I am informed by counsel for the Trust Company, and by counsel for the Reorganization Committee, who are familiar with the situation and the circumstances, and I verily believe, that said Judge suspects and resents the conduct of the Trust Company in instituting said New York suit. Both said Judge and counsel for the Receivers have, on several occasions, reiterated and emphasized the complaint that the Trust Company instituted said ancillary suit and filed said dependent bill, and obtained the appointment of said Warren Olney, Jr., and Frank G. Drum as Receivers under said ancillary bill without the permission of said Judge, and without any authority from him so to do, although the fact is that it is not necessary nor customary in such circumstances to obtain the permission of the Judge of primary jurisdiction for the institution of suits in ancillary jurisdictions or for proceedings thereunder, and that in point of fact no umbrage was taken by said Judge on account of the ancillary proceedings and appointment of Receivers in the District of Utah, in the Eighth Circuit, which have been actually instituted without such permission for the foreclosure of said mortgage.

VII.

In connection with the entry of the decree of foreclosure and sale to be entered in this cause, said Judge, if he were permitted to pass upon the matter, would have to determine and fix the up-set price to be named

in said decree, that is to say, the minimum amount for which the mortgaged property may be sold under such decree, which said up-set price, if the amount for which the property is in fact sold shall not be higher by reason of competitive bidding, will determine the amount of the distributive shares of holders of said Western Pacific First Mortgage bonds and therefore, if the property be purchased by or at the instance of the Reorganization Committee for the benefit of the majority bondholders, the amount which the majority bondholders shall be compelled to pay to each of the minority bondholders for his or her interest in the mortgaged property; such bondholder, however, retaining his or her claim against the Denver Company under Contract B for the interest already accrued, unpaid and unprovided for and for the interest and sinking fund payable upon the portion of the bond principal not paid through the application of the proceeds of such sale. Inasmuch as the Denver Company's obligation under Contract B is only to make up deficits in interest payments and sinking fund payments of only \$50,000 per year, it is manifest that the interest of the minority bondholders is to compel the majority bondholders to pay the highest possible price for the mortgaged property. The interest of the majority bondholders is to obtain the mortgaged property for the lowest possible price. The duty of the Trust Company is to do everything fairly possible to compel the majority bondholders to pay the full and true value of the property at the time of sale, all elements of value and all qualifying factors being considered,

—no more no less—and this duty the Trust Company is prepared and intends fully to perform. As will appear hereinafter, said Judge constituted himself the special guardian and champion of said minority bondholders.

On June 29, 1915, upon the argument of the question whether the prosecution of said New York suit by the Trust Company should be enjoined, raised upon an order to show cause issued at the instance of said Judge, the following statement was made by said Judge as shown by the reporter's transcript of said proceedings. (The statement refers to Western Pacific First Mortgage Bonds.)

“The COURT.—I got five of them myself soon after they were issued, in 1910 I think. I paid ninety-five for them, I think. I am mistaken about the price I paid. I think I paid par for five of them and when I sold them I sold them for ninety-five. I had occasion to sell a couple of them soon after I bought them for ninety-five and the others I gave to Mrs. Van Fleet and I think she got a very little for them.”

As shown by the income tax certificates then in the possession of the Trust Company as Trustee under said mortgage, various members of the immediate family of said Judge, being the wife and children of said Judge, and being also members of his household, were, from the 1st day of March, 1914, until after the 1st day of September, 1914, severally owners in various amounts of First Mortgage bonds of Western Pacific Railway Company, amounting in the aggregate to approximately nine thousand (\$9,000) dol-

lars principal amount, and a sister-in-law of said Judge, who is a member of his household, was at the same time the owner of First Mortgage bonds of said Railway Company in the principal amount of three thousand (\$3,000) dollars. I am credibly informed, and on such information state, that said bonds, three whereof seem to be the bonds mentioned by said Judge as aforesaid, were purchased by or for the persons so owning the same several years prior to said year 1914, and all thereof in or about the year 1910, and until the same were disposed of, as hereinafter stated, were owned by them. The market price of said bonds, as shown by a certain petition of said Savings Union, verified by John S. Drum, hereinafter mentioned, during the years 1910 to 1915, inclusive, were as follows:

1910: maximum 96, minimum 92; 1911: maximum 94, minimum 87; 1912: maximum 87, minimum 81; 1913: maximum 86, minimum 74; 1914: maximum 72, minimum 35; (prevailing price) January 36, February 32.

The market price of said bonds on March 1, 1914, was approximately 68.

I am credibly informed that all of said bonds, except said bonds belonging to the sister-in-law of said Judge, were disposed of by or for their said owners late in the month of February, 1915, approximately one week prior to the commencement of this cause, at which time it was a matter of common knowledge that this cause was about to be commenced in this, the court of said Judge. As I am informed that the market price of said bonds at the time of said sale

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was approximately 33, the loss suffered by the owners of said bonds through the purchase and disposition thereof as aforesaid must necessarily have amounted to several thousand dollars. I have no positive knowledge that said bonds of the said sister-in-law of said Judge have not been disposed of by her, but I have made inquiry concerning said matters, and have been unable to ascertain that the same have been disposed of, and upon the contrary, I am informed and believe that his said sister-in-law was the owner of said bonds subsequently to the promulgation of the above-mentioned Plan of Reorganization, which was not adopted until after December 15, 1915, and that she has not deposited the same under said Plan.

VIII.

Said Railway Company never in any year made net earnings sufficient to pay as much as one-half of the amount due as interest upon its said First Mortgage bonds, or to pay any of the amount payable into the sinking fund therefor. Said bonds were sold to the public largely upon the faith of the obligation assumed by the Denver Company in said Contract B to make said interest and sinking fund payments. Said bonds came into default, and the foreclosure of said First Mortgage became necessary, because the Denver Company ceased, in March, 1915, to pay the interest upon said bonds, or to make up the deficit in interest payments thereon, although previously it had made up all such deficits. As a consequence, holders of Western Pacific First Mortgage bonds generally (both minority and majority bondholders) have felt that the Denver Company is

responsible for the losses which they have suffered through the purchase and subsequent depreciation of said bonds.

Upon the argument of said applications for writs of prohibition and *mandamus* above mentioned, counsel for said Judge, by innuendo, plainly intimated, as I am informed by counsel for the Trust Company there present, that the Trust Company (because opposed to bringing about unnecessarily a receivership of the Denver Company) was and is in collusion with the Denver Company to prevent the enforcement, or the full enforcement, of the obligation of the Denver Company with respect to said interest and sinking fund payments, and one of the counsel for said Judge in arguing said matter, and addressing the United States Circuit Court of Appeals, for the Ninth Circuit, in behalf of said Judge, said:

“When the first day of March passed, the Denver & Rio Grande owed a million and a quarter dollars in respect of its guaranty to pay that coupon interest, the date preceding the filing of the bill here involved. There was no idea of asking it to pay. It is a going concern. We have been told that if we are ruthless we will drive it into bankruptcy. Well, if I owned any of the Western Pacific bonds which had been palmed off on me by the Denver & Rio Grande, and I couldn't get my money back, I would say, ‘Well, considering that I have been robbed of my money, I think the best thing that can happen to you is to be thrown into bankruptcy, so that you won't do it to anybody else another time.’ ”

IX.

Upon the rendition by said Judge of his opinion directing the entry of an order enjoining the prosecution by the Trust Company of said New York suit, said Judge, of his own motion, directed that the Denver Company and the Missouri Pacific Railway Company be made parties to this cause, and intimated in said opinion that the obligations of the Denver Company to the Western Pacific bondholders under Contract B should be ascertained in this cause. Subsequently, on March 6, 1916, in connection with the application for the entry of a decree in this cause above mentioned, said Judge, in the course of a colloquy with counsel, stated, or plainly implied, that in his opinion the Denver Company should, if possible, be compelled to appear as a party in this cause and its said obligations be ascertained and if possible enforced. I quote from said colloquy as follows:

“The COURT.—* * * I think the Court has intimated sufficiently throughout the long argument that was had, and the discussion of that order to show cause, and what it says in its opinion as well, that in its view there can be no competent marshalling or fixing of the value of this property for the purposes of sale, for the essential purpose of fixing an up-set price, without construing the extent and character of the guarantee given in that contract by the Denver & Rio Grande, because if that contract carries a right of protection to the extent that is contended on one side that it does, it might never

be necessary to sell the property of the Western Pacific.

Mr. HOW.—That protection has not been afforded; if it had been, the mortgage of the Western Pacific would not have gone in default.

The COURT.—That does not answer the question. The question is, what are the rights of the bondholders of the Western Pacific under that contract; and if they are such as are seriously claimed for them, counsel can readily perceive that if the Denver & Rio Grande can be held responsible and is able to respond there would be nothing left here as requiring a sale of the physical properties of this road to meet those obligations.

The COURT.—But the Court is bound itself to realize on the security that is submitted to its charge. It cannot turn over to anybody the obligation which rests upon it to marshal these assets.”

X.

Said Judge, at the time of the appointment of Receivers in this cause, was requested by the parties thereto, no one dissenting, to appoint Warren Olney, Jr., as Receiver of the defendant Railway Company, but said Judge, of his own motion, and in order, as he explained, to have as Receiver some one with whom he was well acquainted, and in whom he had personal confidence, appointed also Frank G. Drum as a receiver with Warren Olney, Jr., and thereafter, although it was represented to him by said Warren Olney, Jr., upon behalf of said Receivers that the

then existing legal department of the Western Pacific Railway Company was adequate to the discharge of the legal duties incident to the receivership, appointed John S. Partridge counsel to the Receivers, stating in effect, that he wished in that position a person with whom he was personally acquainted, and upon whom he could implicitly rely. As I am informed by counsel with whom I have consulted on this matter, said Judge had formerly been a partner in the firm of which said Partridge is a member, and the son of said Judge was at the time of such appointment, and still is, an attorney employed by and associated with said Partridge in his private practice.

On the hearing on March 6, 1916, of said application for a decree of sale, which would necessarily have been for the benefit of all of the said bondholders (there being then no creditors claiming any preference over or claiming to share equally with said bondholders, except two creditors, who consented to such decree), said Judge stated, despite the protest of counsel for the Trust Company, that he would not pass upon said application without hearing counsel for the Receivers, and made the following statement:

“The COURT.—* * * The Court is responsible for the administration of this property. Its avenue of aid and of enlightenment is not only counsel for the respective parties, but the counsel for the Receivers and the Receivers themselves. The Court does not propose to make any order in this matter without such enlightenment as will enable it to take a course

which, in its judgment, is going to redound to the safeguarding and the benefit of the bondholders of this road. * * *

I feel that, inasmuch as these Receivers represent the Court, and through their counsel are the mouthpiece of the Court, for its information and for its guidance with reference to the rights of those whose interests have been committed to the keeping of the Court, that they have a right to be heard here. I shall most assuredly give them that right."

Upon the hearing of the return to said order to show cause why the prosecution of said New York suit should not be enjoined, said John S. Partridge, appearing in support of the order *nisi* which had been entered by said Judge upon his own motion, argued not only that the Denver Company should be made a party defendant to this cause, but that its said obligations could be ascertained and enforced in this cause, and that an equitable lien upon its property could be declared and enforced therein, and that, if necessary, said First Mortgage of the Railway Company could be foreclosed as a mortgage in equity upon all of the property of the Denver Company.

Upon said application for decree on March 6, 1916, said John S. Partridge, appearing as counsel for said Receivers, in consequence of the insistence of said Judge that he should and would require the views of said Receivers and their said counsel as to the granting or denial of said application, opposed the entry of a decree until the obligation of the Denver Company should have been adjudicated and if possible enforced.

XI.

On said 6th day of March, 1916, after the application for said decree, said Judge adjourned the hearing of said application until two o'clock in the afternoon of said day, for the purpose of hearing counsel for the Receivers as aforesaid, and upon the hearing of said matter later in said day, said Savings Union applied for leave to be heard concerning the fixing of an up-set price in connection with said decree—a subject concerning which, as I am informed, courts are accustomed to receive the views of interested parties without permitting them to become parties to the cause. Thereafter said Judge continued said matter for one week, in order, as he stated, to enable said Receivers to present affidavits in connection with the same, and thereafter said Savings Union presented a petition for leave to intervene as a party to said cause, and to prosecute the same and participate therein as above stated, and in said complaint of intervention, and as ground for its application for leave to intervene, charged, in substance, that said Reorganization Committee is controlled by the firms of Blair & Co., William Salomon & Co., and William A. Read & Co. (bankers in the city of New York); that the Trust Company is controlled by the Reorganization Committee; that said firms of bankers last mentioned had caused the Denver Company to default in the performance of its said obligations; had caused this foreclosure suit to be instituted; had caused said New York suit to be commenced, and had taken all said proceedings for the purpose of enabling the Denver Company to escape the perform-

ance of its obligations to Western Pacific bondholders under Contract B, and for the purpose of defeating any claim that might be made that the claims of the Western Pacific bondholders under Contract B constituted an equitable lien upon the property of the Denver Company in priority to the liens of said Company's First and Refunding Mortgage, and said Company's Adjustment Mortgage; that said firms of bankers were interested, directly or indirectly, in the bonds of the Denver Company secured by said First and Refunding Mortgage and said Adjustment Mortgage, and entertained the purpose of protecting said bonds as against the interests of Western Pacific bondholders represented by the Reorganization Committee and the Trust Company; and that the Reorganization Committee and the Trust Company are betraying the interests of their respective *cestuis que trustent*.

Upon the hearing of said applications for writs of prohibition and *mandamus* in the United States Circuit Court of Appeals, counsel for said Judge argued that one reason why said Judge should not be compelled to enter a decree of foreclosure and sale in this cause is that said application of the Savings Union for leave to intervene and file said complaint had been made, and the clear implication of said argument was that said application ought to be and would be granted by said Judge and so granted because the Trust Company had shown unfairness and partiality in the administration of its trust, and did not and could not properly represent the minority bondholders in the prosecution of this cause. In the

defense of said applications for writs of prohibition and *mandamus*, and in the argument thereof, counsel for said Savings Union, and counsel for said Judge, co-operated, and despite the fact that said charges of fraudulent conspiracy made in said proposed complaint in intervention were repeated in open court by counsel for said Savings Union, in the presence of counsel for said Judge, said statements were in no way repudiated by counsel for said Judge, or doubt concerning the same expressed, but, upon the contrary, the attitude of counsel for said Judge upon said hearing was one of acquiescence in and of endeavor to support said charges.

XII.

Said applications for writs of prohibition and *mandamus* were heard in connection with an appeal taken by the Trust Company from the order of this Court, entered upon the opinion of said Judge, enjoining the Trust Company from prosecuting said New York suit, and directing the bringing in as parties defendant of the Denver Company and said Missouri Pacific Railway Company. Said Receivers not being parties to said cause were not cited to appear as appellees upon said appeal, and, although the hearing of said appeal in connection with the application for said writs of prohibition and *mandamus* was consented to by all of the parties to said cause, the same was not consented to by said Receivers. Upon the contrary, at the time that the Trust Company was about to take its said appeal from the order of said Judge enjoining the prosecution of said New York suit, counsel for the Trust Company applied to said

John S. Partridge, as counsel for said Receivers, to join all of the parties to this said cause in waiving the issuance of citation upon said appeal, and in stipulating that said cause might be heard on March 16, 1916, together with the applications for said writs of prohibition and *mandamus*; but said John S. Partridge notified counsel for the Trust Company that, after consultation with Garret W. McEnerney, Esq., special counsel for said Receivers and for said Judge, he had decided that it would not be advisable to enter into such stipulation, and refused so to do. Prior to the hearing of said appeal and said applications, said Judge entered *ex parte* an order in this cause, directing counsel for said Receivers to appear upon said appeal, and to oppose the same, the body of which said order reads as follows:

“It appearing that the Equitable Trust Company of New York, plaintiff in the above-entitled cause, has taken an appeal from an order enjoining said The Equitable Trust Company from further proceeding with a certain ancillary and dependent action in the Southern District of New York;

And it appearing that the Receivers heretofore appointed in this cause have not been made parties to said appeal;

It is ordered that the said Receivers be, and they are hereby authorized and directed to take any steps they may deem necessary to protect the jurisdiction of this Court upon the said appeal.

WM. C. VAN FLEET,
United States District Judge.”

Although none of the parties to said cause objected to the hearing of said appeal or to the reversal of said order for injunction, said counsel for said Receivers, acting in real substance, as counsel for said Judge appeared upon the hearing thereof and moved to dismiss said appeal and argued in support of said order.

And said Judge authorized counsel for the Receivers, and Garret W. McEnerney, Esq., a member of the San Francisco bar, to represent him in opposition to said applications for said writs of prohibition and *mandamus*, although said applications were not opposed by any of the parties to said cause. Upon the hearing of said appeal and said applications, said counsel moved to dismiss said appeal upon the ground that the Receivers had not been made parties thereto or cited to appear thereon, and opposed the consideration of said appeal, upon the ground that the Court had not jurisdiction to review said injunctive order, because, as said Judge contended, said order constituted discipline for contempt and was not an injunction in the proper sense of that term, and opposed the consideration of said applications for said writs of prohibition and *mandamus*, upon the ground that the United States Circuit Court of Appeals had not jurisdiction to entertain the same, in all said matters indicating the plain intention of said Judge (notwithstanding a desire previously expressed by him, and which should have been entertained by him to obtain the judgment of said United States Circuit Court of Appeals concerning his jurisdiction to initiate and adjudicate herein said con-

troverſy concerning ſaid claims againſt the Denver Company and to poſtpona a decree in this ſaid cauſe until ſuch controverſy had been adjudicated), to prevent the expreſſion of the judgment of ſaid Circuit Court of Appeals upon ſaid queſtions and to proceed with ſaid cauſe irrefpective of the propriety or impropriety of the courſe which he had determined to adopt with reference to ſaid matters.

Upon conſideration of the facts as I have learned the ſame from an examination of the records in this cauſe, and in ſaid Circuit Court of Appeals, and of the facts outside ſaid records above ſtated, I am convinced and believe that ſaid Judge is determined if there be any way available to him ſo to do, to compel the proſecution of ſaid claims againſt the Denver Company before him in this cauſe, and that he entertains a deep reſentment againſt ſaid Denver Company, and that he believes (although as I verily believe, there is no foundation whatſoever for the belief), that ſaid banking houſes above named have conſpired, as is charged by ſaid Savings Union, to protect the Denver Company and the holders of certain of its bonds, againſt the claim of Western Pacific bondholders, at leaſt in ſome part, and that ſaid Reorganization Committee and the Trust Company are co-operating with them in ſo doing and that the Trust Company intends (although ſuch is not its intention) to endeavor to ſecure an unduly low up-ſet price to be fixed by the decree herein, and that ſaid Judge has acquired and entertains a personal bias and prejudice againſt it on account of ſaid matters and things, as well as the other matters and things hereinabove recited.

XIII.

Said Plan of Reorganization was adopted by said Reorganization Committee on December 17, 1915. A copy of said Plan and the Agreement annexed thereto was delivered by one of the counsel for the Reorganization Committee to said Judge, and a copy thereof to each of said Receivers, on or prior to December 24, 1915. Immediately thereafter, formal notices of the adoption of said Plan were published in various newspapers in the State of California, and lengthy summaries thereof and comments thereon were published in most of the principal newspapers of said State, and particularly in the daily papers of San Francisco. Letters and notices were mailed by the Reorganization Committee to every bondholder whose name appeared upon the income tax certificate lists in the possession of the Trust Company, urging deposits of bonds under said Plan of Reorganization, and inasmuch as the names of the members of the family and household of said Judge who were holders of said bonds prior to the sale thereof in February, 1915, hereinabove mentioned, do appear upon said list, undoubtedly said circular letters were received by various members of the family and household of said Judge, and inasmuch as the said sister-in-law of said Judge was a holder of some of said bonds after the date of the promulgation of said Plan, and unquestionably received said circular letters, and a copy of said Plan was in the possession of said Judge, a knowledge of the contents of said Plan must necessarily have been acquired by said Judge.

Notice that the time for withdrawal of bonds deposited with the Protective Committee, which was the predecessor of said Reorganization Committee in representation of said bondholders, would expire six weeks from the date of the first publication of said Plan, to wit, on February 4, 1916, also was duly published as aforesaid, and notice that the time for deposits thereunder would expire on February 7, 1916, was so published, and was contained in said Plan. Immediately after said last-mentioned date the fact that a very large majority of said bonds, to wit, about \$43,000,000, had become subject to said Plan and Agreement of Reorganization, was published throughout the United States, and particularly in the city and county of San Francisco. The fact also that the financial requirements of said Plan, amounting to \$18,000,000 in cash, had been fully underwritten, and money necessary for the carrying out of said plan, and particularly for the extension of the lines of Western Pacific Railway Company in the State of California, and for the rehabilitation and betterment of its existing lines had been provided, was also so published, and was a matter of common knowledge. It also appeared by reference to said Plan, and the fact was published generally in the papers of the city and county of San Francisco, and was a matter of common knowledge, that if said Plan was to be carried into execution it would be necessary that the same be declared operative by said Reorganization Committee before March 15, 1916, and that if it should not be declared operative before said

date it would cease to be binding upon the depositors thereunder and all such depositors would be at liberty to withdraw their bonds therefrom and said Plan would fail.

During the period which elapsed between December 24, 1915, and February 21, 1916, neither the Trust Company, nor any of the counsel for the Trust Company or said Reorganization Committee, nor anyone connected with any thereof, so far as I have been able to ascertain, ever was apprised in any manner that there was, or would be, any active opposition to the carrying out of said Plan. It was a matter of common and necessary knowledge that a prerequisite to carrying out the same was the entry of a decree of foreclosure and sale in this said cause, and there was never, as I am informed and believe, any intimation during said interval that there would be any objection upon the part either of said Judge or of said Receivers, or of counsel for said Receivers, to the entry of such decree of foreclosure and sale.

Said Plan of Reorganization contemplates the sale under the decree of foreclosure and sale to be entered in this said cause of the rights of Western Pacific Railway Company as such under said Contract B, that is to say, rights under the traffic and trackage provisions of said Contract B, in connection with said Railway's other property, but does not require or contemplate in any contingency the sale of any of the rights of the holders of the bonds of said Company, either with respect to interest payments or sinking fund payments at any such sale, or in this

cause at all, and I am advised by counsel for the Trust Company and said Reorganization Committee that there is no reason whatsoever, if said Judge were willing to direct such course to be pursued, that the said rights of Western Pacific Railway Company, whatsoever the same may be, should not be so disposed of (the rights of said bondholders surviving), and that in such event no bondholder will be prevented from causing his own claims to be enforced thereafter by the Trust Company, as Trustee, under said Contract B, and that if said Judge is of the opinion that the claims of said bondholders against said Denver Company should be ascertained by him, or even enforced in this cause, proceedings to that end, if they be warranted at all, may be taken as well after decree of foreclosure and sale as before such decree.

Nevertheless, on February 21, 1916, said Judge, without allowing any party to this cause any opportunity to be heard concerning the desirability or consequence of such action upon the execution of said Plan of Reorganization, and notwithstanding that the prosecution of said New York suit had already been and then was stayed by a restraining order issued by said Judge at his own instance, and that said Judge had been advised by the petition of one S. C. Wright filed herein and on the same day denied by said Judge, of the purpose of the Trust Company to apply for a decree of sale herein in advance of any attempt to enforce the claims of bondholders against the Denver Company under Contract B,

delivered an opinion in the proceeding to enjoin the Trust Company from proceeding with said New York suit, wherein he directed an order to be entered enjoining said suit, and that said Denver Company and said Missouri Pacific Railway Company be made parties defendant to this cause, and indicated his opinion that the obligations of said Denver Company to said bondholders under Contract B, must be ascertained, and possibly enforced in this cause. In a colloquy between counsel for the Reorganization Committee and the Judge, there was also an intimation, although not very distinct, that said Judge would require said matters to be adjudicated in this cause before he would permit a decree of foreclosure and sale to be entered therein.

At the time the opinion of said Judge was handed down, one of the counsel for the Reorganization Committee suggested to said Judge that the effect of the entry of the order directed in said decision so far as it would initiate new proceedings and would require new parties to be brought in, might be to interfere very seriously with the carrying out of said Plan of Reorganization, and would jeopardize the success of the same, and requested said Judge to delay the entry of that portion of said order until a hearing could be had, and a showing made to him, of the interest of the bondholders as a whole to have said Plan carried out and of the effect upon the success thereof of the order which said judge proposed to enter. Said Judge, however, peremptorily refused to delay the entry of said order, or any part

thereof, and directed the same to be entered, and directed counsel for said Receivers to cause the same to be served upon said Denver Company and said Missouri Pacific Railway Company, and said Companies to be brought into said cause as parties defendant thereto.

Subsequently, and in order that, if possible, an early decree of foreclosure and sale might be had in this said cause, as was absolutely requisite to the execution of said Plan of Reorganization, and in order that the parties in interest might be advised, as it was essential they should be, whether said Judge would in fact permit a decree of foreclosure and sale to be entered with seasonable promptness, counsel for the Trust Company prepared and, as hereinbefore stated, on March 6, 1916, caused to be presented to said Judge in open court a form of decree of foreclosure and sale, which said counsel had previously presented to all of the other parties to this said cause, and to the only creditors claiming preferences therein, who, without exception, had consented and stipulated to the prompt entry thereof. Upon the hearing upon said application said Judge refused to enter said decree, stating, in effect, that until the United States Circuit Court of Appeals of the Ninth Circuit had disposed of said application for a writ of prohibition, which had been made between February 21 and March 6, 1916, he would not pass upon the application for decree, and, in effect, that if his jurisdiction to adjudicate said claims against the Denver Company in this said

cause was not denied by the Circuit Court of Appeals after hearing said application, he would not direct the entry of any decree until the matters of the bondholders' claim against said Denver Company should be disposed of by him. At the same time, said Judge, although requested so to do, refused either to direct the entry of said decree, or to deny the application for the entry thereof, although the suggestion that an order denying said application might be made was made to him with the avowed purpose that such denial of said application might be reviewed upon the merits by the United States Circuit Court of Appeals on a proceeding for *mandamus*. Said Judge manifestly intended to prevent such review, and the expression of the views of said Circuit Court of Appeals concerning the right of the parties to the entry of said decree.

From a consideration of the facts aforesaid, and also of the proceedings which have been taken, as stated elsewhere in this affidavit, to prevent the rendition of any judgment by the Circuit Court of Appeals preventing said Judge from carrying out his purpose to compel a litigation of said matters with said Denver Company in this said court and cause, and compelling said Judge to enter a proper decree of foreclosure and sale herein, I am convinced that said Judge rendered said decision, and refused to permit the entry of said decree in the full belief that his said action would probably defeat the carrying out of said Plan of Reorganization and with the desire that such should be the result thereof, and that

said Judge is personally opposed to said Plan of Reorganization, and is determined to defeat the same.

As in this affidavit above stated, said Judge is aware that the Trust Company, as in duty bound, has co-operated, in various proper ways, with said Reorganization Committee in the endeavor to carry out said Plan of Reorganization, and identifies said Trust Company with said Reorganization Committee, and believes that it is a partisan of said Plan, and of the bondholders who have joined therein, and I verily believe he has a personal prejudice against the Trust Company by reason, among other things, of its said co-operation with the Reorganization Committee in the endeavor to carry out said Plan of Reorganization.

XIV.

At various times during the administration of the receivership in this cause, as I am informed by counsel for the Trust Company, counsel for the Receivers have submitted to the Court applications for orders authorizing the Receivers to adopt contracts, leases or other arrangements, made by the Railway Company with third parties, and also applications for orders authorizing the Receivers to enter into contracts, leases, or other arrangements with third parties, for or in connection with the use of property. Upon said applications, counsel for complainant, who has appeared thereon, has frequently objected to the making of any such orders if the same purported to operate, or if the same could operate by their own force, beyond the period of the receivership. When such objections were

originally made by counsel, said John S. Partridge, as counsel for the Receivers, took the position that said orders could, would and should so operate, but said Judge, after considering the question, stated that, in his opinion, the proper construction of said orders should be that they would not operate except during the period of the Court's control of the property through its Receivers, unless they should expressly provide to the contrary. Counsel for the complainant requested the Court either to incorporate such statement in each order, or to enter a standing order directing that such construction should be given to every such order in absence of a contrary declaration in the order itself. Said Judge, notwithstanding the fact that he had expressed the view above stated with respect to the proper construction of such orders and that said John S. Partridge had previously expressed a contrary view and that said orders did not by their terms contain any limitation, stated that he would incorporate such statements in said orders, or make such standing orders, if, but not unless, said John S. Partridge as such counsel would consent thereto.

Shortly after said Judge, upon his own motion, directed the issuance of an order in this cause restraining the Trust Company from prosecuting said New York suit, pending decision upon the order to show cause why an injunction should not issue, counsel for the Reorganization Committee called upon said Judge at his Chambers, and represented to said Judge that the primary object of maintain-

ing said bill in New York was to obtain an injunction restraining the prosecution of suits against the Denver Company by individual bondholders suing upon direct guaranties, to the detriment of all other bondholders, and that the restraining order made in this proceeding was so broad that even this limited object could not be accomplished and said counsel suggested to the Judge that it was to the best interests of the bondholders as a whole so to modify the restraining order as to permit proceedings to be taken in the New York jurisdiction, for the sole purpose of obtaining injunctions against such suits by individual bondholders against the Denver Company which might create preferences or otherwise result in embarrassment to the bondholders as a whole, and counsel stated that the modification of the restraining order so as to permit injunctions to be issued against individual bondholders would further that end. The said Judge, nevertheless, stated that he would not make any order modifying the restraining order in any manner, unless such modification were consented to by counsel for the Receivers, but also stated that if such modification were so consented to, the same would be made.

XV.

By reason of the facts above stated with respect to and connected with the appointment of said Frank G. Drum as one of the Receivers of Western Pacific railway Company, and the appointment of said John S. Partridge as counsel for said Receivers, and the action of said Judge in instituting, and of said Part-

ridge in prosecuting, said injunction proceedings to restrain the prosecution of said New York suit, and the suggestion by said Partridge in argument of proceedings for bringing in the Denver Company as a party defendant in this cause, and the action of said Judge, on his own motion, in directing the same, and the declared purpose of both said Judge and said Partridge to compel an adjudication upon said claims against said Denver Company before the entry of decree herein, and the expressions of said Judge, hereinabove related, with respect to relying upon said Receivers and said counsel, and looking to them for information and guidance, and the action of said Judge, hereinabove related, in confiding the defense of said applications for writs of prohibition and *mandamus* to counsel for said Receivers, and particularly said John S. Partridge, and in directing said counsel to oppose the consideration of said appeal, and in permitting his said counsel to co-operate upon the hearing of said applications for writs of prohibition and *mandamus* with said Savings Union and its counsel, and of the action of said Judge in submitting his judgment to, and following the wishes of, said John S. Partridge as counsel for said Receivers in said matters last above mentioned, I am led to believe, and do believe, and so charge, that said Judge has a personal bias and prejudice in favor of said Receivers and their said counsel, as well as against the Trust Company.

XVI.

The complaint in intervention of said Savings Union was made and presented to the Court at the

instance of John S. Drum, Esq., who is the president of said Savings Union and a stockholder therein, and who verified said complaint. Said John S. Drum is the younger brother of Frank G. Drum, who, as above stated, is one of the Receivers of the Railway Company appointed by said Judge, and one of the especially trusted representatives and confidential advisers of said Judge.

The hearing of the said appeal from the injunction directed by said Judge against the prosecution of said New York suit, and upon said applications for writs of prohibition and *mandamus*, took place before the United States Circuit Court of Appeals, for the Ninth Circuit, sitting in the city and county of San Francisco. At the opening of court on Thursday, the 16th day of March, 1916, counsel for said Savings Union stated to the Court that in connection with the applications for the writs of prohibition and *mandamus* he appeared on behalf of said Savings Union, and asked leave to file a petition in opposition to the issuance of the writ of prohibition, and asked that it might be argued in connection with the whole matter, and the fact that an application of the Savings Union for leave to intervene in this said cause had been made was referred to by counsel for said Judge as a ground of objection upon his part to the granting of the writ of prohibition, and more particularly the writ of *mandamus* then applied for in said United States Circuit Court of Appeals, and both said facts were referred to in said newspapers, and must necessarily have come to the knowledge of said Judge. On Friday, March 17, 1916, counsel

for said Savings Union again appeared, co-operating and as if associated with counsel for said Judge, and argued at length in support of their said petition for leave to intervene, making various charges of fraud and bad faith against the Trust Company, and those with whom said counsel alleged the Trust Company had co-operated in respect to its actions as Trustee under said Mortgage and under said Contract B. No protest was made by said Judge, or his counsel, against this proceeding upon the part of said Savings Union, but counsel for said Judge, not only by so relying upon the existence of said application, but also by endeavoring in argument, as elsewhere stated herein, to create the impression that said complaint in intervention and the charges of fraud made therein were justified, and by insinuating that said Judge might have acted as he did because he had inferred upon his own account the truth of the frauds so charged, by implication and innuendo supported such charges of fraud, and in effect said action of said Savings Union. Wherefore, I am led to believe, and do believe, and so charge, that said Judge has a personal bias and prejudice in favor of said Savings Union.

XVII.

This affidavit was not filed ten days before the beginning of the pending term of court of said United States District Court, for the Northern District of California, to wit, prior to March 6, 1916, for the following reasons:

The plaintiff is a New York corporation, having its principal offices in the city of New York, where

I reside, and having no branch offices or representatives in the city and county of San Francisco, or in the portion of the United States west of the city of New York; that none of the facts and things herein stated, other than the general course of the proceedings in said cause, the appointment of said Frank G. Drum as one of said Receivers, the appointment of said John S. Partridge as attorney for the said Receivers, and the rendition of the opinion of said Judge on February 21, 1916, and the fact that said Judge and counsel for said Receivers had apparently taken umbrage to some extent on account of the prosecution of said New York suit without said Judge's permission, were known to the Trust Company, or any of its officers or agents until after March 6, 1916; that, as I am informed by counsel for the Trust Company, Jared How, Esq., one of said counsel, resident in San Francisco, was familiar prior to March 6, 1916, with the matters above stated which had occurred prior to said day. He, nevertheless, believed, as he has informed me, that in spite thereof said Judge could not and would not refuse to enter a proper decree in this cause whenever the same should be ready for decree, or if all of the parties thereto should stipulate for the entry of such decree, and that despite the fact that there was contained in the opinion of said Judge rendered on the 21st day of February, 1916, an intimation that he considered it necessary that the obligations of the Denver Company should be enforced in this cause, there was not then any clear intimation that he considered it essential that the same should be so enforced prior

to the entry of decree of foreclosure and sale herein, and that said counsel believed that whenever an application for a decree, consented to by all parties to said cause, should be presented to said Judge, he would be bound to grant the same, whether or not he should determine to proceed in the cause with the prosecution of said claims against the Denver Company; and that it was not until after the refusal of said Judge to proceed to decree in said cause on March 6, 1916, that counsel for the Trust Company had any clear ground for the belief that the personal bias and prejudice of said Judge was influencing him and might continue to influence him in his conduct and decisions in said cause to the substantial and irreparable injury of the interests of the bondholders of the Railway Company and of the Trust Company as their trustee; and it was not until after the complaint in intervention of the Savings Union had been filed in the District Court, and the charges of fraud and bad faith therein contained had been put forward in argument before the United States Circuit Court of Appeals on the 16th and 17th days of March, 1916, and had been acquiesced in, and apparently approved by, counsel for said Hon. William C. Van Fleet (said counsel then and there collaborating with counsel for the proposed intervenor), as justifying the action taken by said Judge before any such charges were made, that any director, officer or agent of, or counsel for, the Trust Company became fully convinced that said Hon. William C. Van Fleet had a personal bias and prejudice against the complain-

ant herein, which would cause him to persist in denying to the complainant the relief to which it is entitled in said cause and so seriously influenced him therein as to make it the duty of the Trust Company to cause an affidavit of prejudice to be filed herein. Shortly after receiving information of the action of said Judge on said 6th day of March, 1916, from its counsel in San Francisco and forthwith upon receiving information that said Savings Union had on March 13, 1916, applied for leave to intervene in said cause and file herein its said complaint in intervention and of the character of said complaint and that the apparent purpose thereof and of said Judge was to postpone indefinitely the entry herein of a decree of foreclosure and sale and being requested so to do by the President and New York counsel of the Trust Company, on March 14, 1916, I left the city of New York and went directly to the city of San Francisco, arriving therein on the 18th day of March, 1916. I forthwith proceeded to interview various persons, and particularly the counsel for the Trust Company present in San Francisco, and the counsel for the Reorganization Committee present in said city, and to examine the various papers and documents in this cause herein referred to, and by such inquiry and investigation familiarized myself with the facts and circumstances hereinabove set forth. As the result of such inquiries and investigation, I became satisfied that such personal bias and prejudice on the part of said Judge does exist and that it would be impossible by reason of the same for the complainant

herein to obtain a fair consideration for and reasonably prompt enforcement of its rights and the rights of all said bondholders while said Judge should remain in control of said cause or the administration of said receivership herein and that it was necessary and the duty of the Trust Company to cause this affidavit to be filed herein. Nevertheless, I was advised by counsel for the Trust Company that, inasmuch as said applications for writs of prohibition and *mandamus* had been submitted to said Circuit Court of Appeals and as at least the question of the power of said Judge to compel the litigation of said claims of said bondholders against the Denver Company and to postpone the entry of a decree herein until the conclusion of such litigation had been submitted thereupon to said Circuit Court of Appeals, it would not be proper to file this or any such affidavit, until after the decision thereon of said Circuit Court of Appeals should be rendered unless it should be necessary so to do in order to prevent said Judge from acting in the meantime with respect to some one or more of said controverted matters hereinabove mentioned. On March 20, 1916, said Judge announced that he would not act in such matters until the decision of said Circuit Court of Appeals should be rendered and thereupon I returned to the city of New York and reported the facts stated in this affidavit, and the other facts and opinions which I had gotten concerning the attitude and conduct of said Judge to the President and Executive Committee of the Trust Company. Thereafter and at the first meeting of said Executive Committee held

after my return, to wit, on March 29, 1916, the Executive Committee considered my said report and also a resolution which on March 20, 1916, had been adopted by said Reorganization Committee requesting the Trust Company so to do and thereupon adopted a resolution authorizing the execution of an affidavit of bias and prejudice in such form as should be approved by counsel for the Trust Company under my supervision, and requesting me to verify the same and cause the same to be filed not only as my individual act but upon behalf of the Trust Company and therein to insist that said Judge shall proceed to further in this said cause and otherwise as hereinbelow prayed. Accordingly I have, at this my earliest opportunity thereafter, verified this affidavit, which has been so approved by said counsel.

WHEREFORE, I, individually, and on behalf and as the authorized officer of said complainant, The Equitable Trust Company of New York, do now and hereby pray and insist that said Judge, the Hon. William C. Van Fleet, shall proceed no further in this said cause, or in any matter arising therein, and that another Judge shall be designated therefor, in the manner by law prescribed, and that said Judge shall cause the fact of this affidavit and application to be entered on the records of the court, and also an order that an authenticated copy hereof shall be forthwith certified to the senior Circuit Judge for this Ninth Circuit, then present in said circuit; and for such further proceedings as are prescribed by law.

LYMAN RHOADES.

64 *In re Petition of Equitable Trust Company.*

Subscribed and sworn to before me this 29th day of March, 1916.

[Seal] MYLES M. BOURKE,
Notary Public, New York County No. 222, Register's
Office No. 6148.

Term expires March 30, 1916.

I HEREBY CERTIFY that I am the counsel of record of the complainant in the above-entitled cause, The Equitable Trust Company of New York, as Trustee, and that I reside in the city of San Francisco, and am a member of the bar of the United States District Court, for the Northern District of California, and that I am familiar with the proceedings in said cause, and have read the affidavit of Lyman Rhoades, to which this certificate is appended, and that such affidavit and application are made in good faith.

JARED HOW,
Counsel of Record for said Complainant, The Equitable Trust Company of New York.

*In the District Court of the United States, in and for
the Northern District of California, Second
Division.*

IN EQUITY—No. 169.

THE EQUITABLE TRUST COMPANY OF
NEW YORK, as Trustee,

Plaintiff,

vs.

WESTERN PACIFIC RAILWAY COMPANY
et al.,

Defendants.

An affidavit of personal bias and prejudice and application that another Judge shall be designated for further proceedings in this action, accompanied by a certificate of counsel of record for plaintiff herein that such affidavit and application are made in good faith, having been filed by said plaintiff in this action.

IT IS HEREBY ORDERED that the fact of the filing of such affidavit and application be entered on the records of the court and that an authenticated copy thereof shall be forthwith certified to the Senior Circuit Judge for this circuit now present in the circuit, to the end that such proceedings may be had thereon as are provided by law.

Dated, this 3d day of April, 1916.

District Judge.

**Exhibit II [to Petition for Mandamus Proceedings
Had April 3, 1916, Re Motion to Disqualify, etc.].**

*In the District Court of the United States, for the
Northern District of California, Second Division.*

IN EQUITY—No. 169.

Before Hon. W. C. VAN FLEET, Judge.

THE EQUITABLE TRUST COMPANY OF
NEW YORK

vs.

WESTERN PACIFIC RAILWAY COMPANY,
et al.,

Monday, April 3d, 1916.

REPORTER'S TRANSCRIPT.

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AFFIDAVIT AND PROCEEDINGS ON MOTION
TO DISQUALIFY, ETC.

*In the District Court of the United States, in and for
the Northern District of California, Second
Division.*

IN EQUITY—No. 169.

Before Hon. WM. C. VAN FLEET, Judge.

THE EQUITABLE TRUST COMPANY OF NEW
YORK, as Trustee,

Plaintiff,

vs.

WESTERN PACIFIC RAILWAY COMPANY,
et al.,

Defendants.

Monday, April 3d, 1916.

Counsel Appearing:

For the Equitable Trust Co. of New York, Trustee:
JARED HOW, Esq.

For the Central Trust Co.: T. A. THACHER, Esq.

For the Boca & Loyaltan Railroad: Messrs. SLACK
& GOODRICH.

For the Savings Union Bank & Trust Company:
Messrs. PILLSBURY, MADISON & SUTRO.

For the Reorganization Committee: JOHN F.
BOWIE, Esq.

For the Receivers: JOHN S. PARTRIDGE, Esq.

The COURT.—Any *ex parte* matters?

Mr. HOW.—In the case of the Equitable Trust Company of New York vs. the Western Pacific Railway Company, there has been filed an affidavit to the effect that your Honor entertains personal prejudice against the plaintiff.

The COURT.—Against whom?

Mr. HOW.—Against the plaintiff.

The COURT.—A corporation?

Mr. HOW.—Yes, your Honor, the Equitable Trust Company of New York, the plaintiff in the suit.

The COURT.—What is the basis of it? I don't even know the plaintiff, except as a corporation.

Mr. HOW.—The affidavit is about 30 pages long. I received it this morning and have read it, and have certified it as counsel of record as having been made in good faith. I should hesitate to attempt to state to your Honor the full contents of it.

The COURT.—How do you propose that I become possessed of it?

Mr. HOW.—It has been filed.

The COURT.—Well, suppose it has? It must be presented to the Court in some way, must it not?

Mr. HOW.—Not under the statute. I suggest to your Honor that the statute, section 21 of the Judicial Code, provides that upon the filing of the affidavit the Judge shall take no further proceedings in the cause, but shall forthwith certify to the Senior Circuit Judge then in the circuit the fact that the affidavit has been filed, with a copy of the affidavit and the application. The application is for the des-

ignating of another judge for further proceedings in the cause.

The COURT.—The court would certainly not be justified in making any such order until he saw that the affidavit was one that the statute contemplated.

Mr. HOW.—I think that the Circuit Court of Appeals for this circuit has held that the matter of whether the affidavit is sufficient, or not, is not for this Court to determine.

The COURT.—Well, you had better present authorities on that.

Mr. HOW.—I suggest to the Court that the affidavit has been filed, and I suggest to the Court that the Court can take no further proceedings in the action, and I submit to your Honor the form of an order.

The COURT.—I would not be disposed to acquiesce in that view unless you have some authorities on the subject.

Mr. HOW.—I am not prepared with authorities, your Honor, now. I filed this this morning forthwith upon receiving it, under instructions.

The COURT.—Then I will request you to read it. The mere filing of the affidavit does not satisfy the statute. Of course, if it is a mere attack upon a Judge growing out of the fact that a party thinks it will be prejudiced by reason of permitting it to remain with him, that is one thing; if it is a matter of substance, that is another thing. Of course, no Court can be expected to sit silent and permit an attack of that kind to be made upon it without knowing what it is; it cannot fold its hands and surrender

its jurisdiction if it is properly exercising it. The mere filing of an affidavit does not satisfy the statute. It depends upon what the affidavit is. Of course, it always has been held, so far as my observation is concerned, that so far as it tends to disclose any facts upon which prejudice may be predicated, the Judge assailed is entitled to file a response, file a statement of what the fact is. It would be a monstrous proposition if a party, merely because they might have in view some other person or some other tribunal that would be subservient to their interests could attack a Judge merely for the purpose of disqualifying him.

Mr. HOW.—I understand your Honor wants me to read this affidavit?

The COURT.—Yes.

Mr. HOW.—I protest against doing that, because I think the filing of the affidavit is all that is required. I am quite willing to read it, though.

The COURT.—Well, I am not insistent on subjecting you to the physical task of reading the affidavit, Mr. How, but I must be made acquainted with its contents.

Mr. HOW.—Oh, I don't mind the physical part of it at all, your Honor. I will read it.

“In the District Court of the United States, in and for the Northern District of California, Second Division.

IN EQUITY—No. 169.

“THE EQUITABLE TRUST COMPANY OF
NEW YORK, as Trustee,

Plaintiff,

vs.

“WESTERN PACIFIC RAILWAY COMPANY
et al.,

Defendants.

“AFFIDAVIT OF PERSONAL BIAS AND
PREJUDICE, FILED PURSUANT TO SEC-
TION 21 OF THE JUDICIAL CODE.

“State of New York,

“City and County of New York,—ss.

“Lyman Rhoades, being first duly sworn, deposes
and says:

“I.

“I am one of the vice-presidents of The Equitable Trust Company of New York (hereinafter called also the Trust Company), being The Equitable Trust Company of New York, as Trustee, named as plaintiff in the above-entitled action. I make this affidavit for and on behalf of said The Equitable Trust Company of New York, and of said Trust Company, as such Trustee and plaintiff. I am in charge of the Trust Department of said Trust Company, and particularly in charge of the matter of executing the trusts vested in said Trust Company, and I am in

charge of the execution of the trusts vested in said Trust Company by and as Trustee under the First Mortgage of the Western Pacific Railway Company (hereinafter sometimes called the Railway Company), and under that certain Contract B hereinafter referred to.

“II.

“The above-entitled cause is a suit for the foreclosure of the First Mortgage of the Railway Company, and is now pending in the United States District Court, for the Northern District of California, and in the Second Division of said court, and the Hon. William C. Van Fleet is the regularly presiding Judge in said Division and cause, and has exclusive control of all matters arising in said cause. Said William C. Van Fleet, Judge of said court before whom said cause is pending, has a personal bias and prejudice against The Equitable Trust Company of New York, the plaintiff in said cause above-entitled. Said Judge has a personal bias and prejudice against The Equitable Trust Company of New York, as Trustee and as plaintiff in the above-entitled cause. Said Judge has a personal bias and prejudice in favor of Frank G. Drum and Warren Olney, Jr., as Receivers of Western Pacific Railway Company appointed in said action, and John S. Partridge, their counsel, who have by their actions, hereinafter recited, and under the authority, or with the acquiescence of the Court, become parties to various controversies which have arisen in said cause, and to which the Trust Company is also a party. Said Judge has a personal bias and prejudice in favor of the Savings Union Bank &

Trust Company, which said Savings Union Bank & Trust Company (hereinafter called the 'Savings Union') has sought to intervene in said cause, and to become a party thereto."—

The COURT.—That evidently was made before the decision of the Circuit Court of Appeals, wasn't it?

Mr. HOW.—It was made on the 29th day of March, 1916.

The COURT.—That was the day on which the opinion was filed.

Mr. HOW.—Yes, it was.

The COURT.—So, the affidavit was really made before the opinion was filed.

Mr. HOW.—News of that opinion did not get to them until very late in the afternoon; I think this was in the mail at the time.

"The facts and reasons for my belief that such personal bias and prejudice exist are as follows:

"III.

"There are pending in said cause the following controversies and matters to which the Trust Company is a party:

"1. A proceeding initiated by said Judge upon his own motion to enjoin the Trust Company from prosecuting a certain suit by it commenced in the United States District Court, for the Southern District of New York, against the Denver & Rio Grande Railroad Company (hereinafter called the Denver Company) and others. This proceeding is being prosecuted by said Receivers and their counsel at the instance of said Judge, and defended by the Trust Company.

"2. An application by the Trust Company, as complainant herein, for a decree of foreclosure and sale of the property of the Railway Company subject to said First Mortgage. This application is opposed by said Receivers and their said counsel. Upon the hearing of said application, if the Court shall hear the same, the question of what, if any, up-set price shall be fixed as the minimum price to be accepted for the property to be sold, will necessarily arise.

"3. A proceeding initiated by the Judge upon his own motion to bring said Denver Company into this cause as a party defendant, and to determine in this said cause its liability under a certain agreement dated June 23, 1905, between The Denver & Rio Grande Railroad Company and the Rio Grande Western Railway Company (predecessors and constituent corporations of said Denver Company), the Railway Company and the Trustee under its said First Mortgage, commonly known and herein called 'Contract B,' and, if possible, to enforce the same. (Copies of said Contract B have been filed in this cause and are part of the record therein, and I pray leave to refer to the same as if a full copy thereof were incorporated in this affidavit.) Such liability arises from an obligation upon the part of the Denver Company to pay to the Trust Company for the holders of said First Mortgage bonds the difference between the amount due from the Railway Company for interest and sinking fund payable upon its said First Mortgage bonds, and the amount actually paid by the Railway Company on account of the same.

This proceeding is being conducted by the Receivers and their counsel by direction of the Court, and is opposed by the Trust Company.

“4. An application of said Savings Union to be permitted to intervene in said cause, in order that it may participate in the prosecution thereof, and particularly of said claim against the Denver Company, and oppose the entry of any decree in said cause until said claim be disposed of, and when a decree shall be entered, to procure the fixing of the largest possible up-set price. The granting of said application is opposed by the Trust Company.

“IV.

“Holders of a large amount (namely, about \$43,900,000 principal amount, out of \$50,000,000 outstanding) of Western Pacific Mortgage bonds have joined in forming a Reorganization Committee, and adopting a Plan and Agreement for the reorganization of the Railway Company. Another committee has been formed in Amsterdam, Holland, by holders of such First Mortgage bonds, principally resident in Holland, and represents, as I am informed and believe, about \$3,000,000 principal amount, of such bonds; and while said committee has not as yet acted in approval or disapproval of said Plan, said Committee, in the matters which have arisen in connection with the suit brought by the Trust Company in the United States District Court for the Southern District of New York and the attempt of said Judge to prevent the prosecution thereof and matters consequent thereon, has acted in co-operation with said Reorganization Committee. This Plan, in the

opinion of the Trustee, is a proper and fair plan. All bondholders have been and are at liberty to join therein, and said Plan, in the opinion of the Trustee, in no way tends to prejudice the rights or interests of such bondholders as do not join therein. Said First Mortgage provides that the Trustee, in all proceedings under the Mortgage, shall obey the directions of the holders of a majority of said bonds, and the Trustee is co-operating with, and as in duty bound, is receiving and obeying the instructions as to such proceedings from said Reorganization Committee, as the holders of a majority in amount of said bonds. It has not, however, received any instructions, or taken any proceedings, which operate to the advantage of one set of bondholders as distinguished from another. The Judge, nevertheless, identifies the Trust Company with the Reorganization Committee, and, as appears from a colloquy between the Judge and counsel, which took place in open court on March 6, 1916, apparently regards the Trust Company as in reality not acting for the bondholders who have not joined in said Plan, and as the representative solely of the bondholders who have joined therein. On that occasion, the Judge said, referring to the Trust Company's application for a decree of foreclosure and sale herein, to be made for the benefit of all of the holders of said First Mortgage bonds:

" * * * Now, the Court unquestionably proposes to have such light upon the situation as will enable it to proceed in accordance with the rights of all the parties here concerned, because the Court is not here alone sitting to adjudicate rights of any par-

ticular lot of bondholders, or section of bondholders; it must protect them all, the smallest with the largest, the greatest with the least. * * *

“The COURT.—The Court is in this position: It is just as much bound, as I have indicated, to protect the rights of those bondholders who have seen fit to stand out and not subscribe to the reorganization scheme as those who have subscribed. * * * ’”

The COURT.—Do they controvert that proposition?

Mr. HOW.—I would rather read the affidavit.

The COURT.—Well, proceed.

Mr. HOW.—(Reading:) “‘Now, they are before the Court; this Court is obligated to protect their rights equally with that of any body of bondholders who may desire a different course to be pursued.’

“In making this statement, and other like statements, the Judge clearly implied that the Trustee was acting only in the interest of bondholders who had joined in said Plan of Reorganization, and was not caring for all of the bondholders, as it is in duty bound to do, and as in fact it is doing.

“Counsel for the Judge, upon the hearing on March 16th and 17th, 1916, of applications to the Circuit Court of Appeals, for the Ninth Circuit, for writs of prohibition and mandate, intended to prevent the Judge’s taking in this cause said proceedings against the Denver Company and to compel the entry of a proper decree of foreclosure and sale, which applications were made by the Trust Company, clearly intimated in argument, as I am informed by counsel for the Trust Company there present, that the Trustee

could not be trusted, in the opinion of the Judge, to act fairly and impartially in protecting the interests of said minority bondholders, as well as the interests of the majority bondholders.

“V.

“The bondholders who have joined in the formation of the Reorganization Committee and the Trustee have been advised by their respective independent counsel, and are of the opinion, that the obligations under Contract B of The Denver Company to the Trustee and the bondholders, in respect to the making of interest and sinking fund payments, are not subject to said First Mortgage, and in this suit for the foreclosure thereof no decree is sought for the sale or other disposition of said last-mentioned obligations. It is, and at all times has been, the desire of the said bondholders (hereinafter called the majority bondholders) that the property of the Railway Company shall at once be sold, and if a proper price cannot otherwise be realized therefor, that the same shall be purchased in the interests of such of the bondholders as may join in said Plan of Reorganization, and shall be improved and operated for their benefit as stockholders of a new corporation, to be formed for the purpose. It is also their desire and intention, if so permitted, that the said claim against the Denver Company shall survive in the hands of the Trust Company, as Trustee under Contract B, in order that such new corporation may, if possible, by negotiations with the Denver Company, realize therefrom, so far as such claim pertains to the bonds of said majority bondholders, the greatest possible advan-

tage to said new corporation and its stockholders (now said bondholders), it being the purpose of the majority bondholders to pursue the prosecution of said claim against the Denver Company, so far as it pertains to their said bonds, only in event that it shall prove impossible by means of negotiation to make a thoroughly satisfactory settlement thereof in the interest of such bondholders; but otherwise to insist upon the enforcement of the same. The majority bondholders believe, and the Trustee agrees, that the prosecution of said claim in court will almost certainly result in the insolvency and the appointment of receivers for the Denver Company, and that in consequence the entire benefit of said claim will be lost, unless the bondholders are prepared to protect themselves in the course of a reorganization of the Denver Company.

“VI.

“As a consequence of the foregoing consideration, the Trustee, acting as Trustee of the trust created by said Contract B, as it was advised that it was its right and duty to do, at the request of the majority bondholders (represented by a protective committee, which was the predecessor of the Reorganization Committee, as the representative of a majority in amount of said bonds, and was composed of the same individuals), in May, 1915, filed in the United States District Court, for the Southern District of New York, a bill in equity, denominated as a bill ancillary to the bill of complaint in said cause pending in this court, and procured the appointment as Receivers of the Railway Company in said District the same

persons who had been appointed Receivers thereof in this Northern District of California, and thereupon filed in said United States District Court, for the Southern District of New York, a so-called dependent bill, whereby the Trust Company sought as ultimate relief the enforcement of the said obligations of the Denver Company to all of said bondholders, but incidentally and primarily the enjoining of individual bondholders, whose bonds, or some of them, bore direct guaranties of interest payments endorsed thereon by the Denver Company, from enforcing said direct guaranties, inasmuch as the result of such enforcement would be to impair or impede the enforcement of the obligations of Contract B which run in favor of all holders of said Western Pacific First Mortgage bonds. (Such direct guaranties are endorsed upon only a portion of said bonds.) Upon the institution of said suit in New York, said Judge displayed resentment at the Trust Company's action in commencing the same without his permission. At the same time both said Receiver, Frank G. Drumm, and said counsel for said Receivers, John S. Partridge, were greatly disturbed, and stated, in substance, that they felt affronted by the action of the Trust Company, and expressly stated, in substance, that the action of said Trust Company was an affront to said Judge, and to themselves. Upon an application made shortly thereafter by said Receivers for instructions as to whether they should institute suit for the enforcement of the Denver Company's said obligations, said Judge of his own motion issued an order, directed to the Trust Company, to show cause

why it should not be enjoined from prosecuting or taking other proceedings in said suit pending in New York. And subsequently said Judge rendered an opinion, and of his own motion caused to be entered an order enjoining the Trust Company from taking any further proceedings in said cause, and likewise, although no application therefor had been made by anybody, enjoining the Trust Company from prosecuting said obligations of the Denver Company in any court save in the court of said Judge, or taking any action with respect to said obligations of the Denver Company, or which might affect the same, without the permission of said Court, that is to say, of said Judge. Subsequently, and upon the hearing of an appeal from said order taken by the Trust Company to the Circuit Court of Appeals for the Ninth Circuit and of said applications for writs of prohibition and *mandamus* above mentioned, said Judge, through his counsel, filed motions to dismiss all of the same, and demurrers to the petitions for such writs, and returns to the alternative writs, and thereby alleged and claimed that said proceeding to enjoin the Trust Company as above stated was in reality a proceeding in contempt, and that said Trust Company had been in contempt of said Judge and his said court, and has in effect, by the order of said Judge, been adjudged so to be in contempt. And said Judge and his said counsel have clearly intimated in connection with said proceedings for injunction, and for said writs of prohibition and *mandamus*, that said Judge and his said Receivers and counsel believe that the

Trust Company instituted said New York suit for the purpose of evading the jurisdiction of the Judge, and that the Trust Company and the majority bondholders are unwilling to confide their interests under said contract to the decision of said Judge, and I am informed by counsel for the Trust Company, and by counsel for the Reorganization Committee, who are familiar with the situation and circumstances, and I verily believe, that said Judge suspects and resents the conduct of the Trust Company in instituting said New York suit. Both said Judge and counsel for the Receivers have, on several occasions, reiterated and emphasized the complaint that the Trust Company instituted said ancillary suit and filed said dependent bill, and obtained the appointment of said Warren Olney, Jr., and Frank G. Drumm as Receivers under said ancillary bill, without the permission of said Judge, and without any authority from him so to do, although the fact is that it is not necessary nor customary in such circumstances to obtain the permission of the Judge of primary jurisdiction for the institution of suits in ancillary jurisdictions or for proceedings thereunder, and that in point of fact no umbrage was taken by said Judge on account of the ancillary proceedings and appointment of Receivers in the District of Utah, in the Eighth Circuit, which have been actually instituted without such permission for the foreclosure of said mortgage.

“VII.

“In connection with the entry of the decree of foreclosure and sale to be entered in this cause, said Judge, if he were permitted to pass upon the matter

would have to determine and fix the up-set price to be named in said decree, that is to say the minimum amount for which the mortgaged property may be sold under such decree, which said up-set price, if the amount for which the property is in fact sold shall not be higher by reason of competitive bidding, will determine the amount of the distributive shares of holders of said Western Pacific First Mortgage bonds and therefore, if the property be purchased by or at the instance of the Reorganization Committee for the benefit of the majority bondholders, the amount which the majority bondholders shall be compelled to pay to each of the minority bondholders for his or her interest in the mortgaged property; such bondholder, however, retaining his or her claim against the Denver Company under Contract B for the interest already accrued, unpaid and unprovided for and for the interest and sinking fund payable upon the portion of the bond principal not paid through the application of the proceeds of such sale. Inasmuch as the Denver Company's obligation under Contract B is only to make up deficits in interest payments and sinking fund payments of only \$50,000 per year, it is manifest that the interest of the minority bondholders is to compel the majority bondholders to pay the highest possible price for the mortgaged property. The interest of the majority bondholders is to obtain the mortgaged property for the lowest possible price. The duty of the Trust Company is to do everything fairly possible to compel the majority bondholders to pay the full and true value of the property at the time of sale, all elements

of value and all qualifying factors being considered—no more and no less—and this duty the Trust Company is prepared and intends fully to perform. As will appear hereinafter, said Judge has constituted himself the special guardian and champion of said minority bondholders.

“On June 29, 1915, upon the argument of the question whether the prosecution of said New York suit by the Trust Company should be enjoined, raised upon an order to show cause issued at the instance of said Judge, the following statement was made by said Judge as shown by the reporter’s transcript of said proceedings. (The statement refers to Western Pacific First Mortgage Bonds.)

“The COURT.—I got five of them myself soon after they were issued, in 1910 I think. I paid ninety-five for them, I think. I am mistaken about the price I paid. I think I paid par for five of them and when I sold them I sold them for ninety-five. I had occasion to sell a couple of them soon after I bought them for ninety-five and the others I gave to Mrs. Van Fleet and I think she got a very little for them.

“As shown by the income tax certificates then in the possession of the Trust Company as Trustee under said Mortgage, various members of the immediate family of said Judge, being the wife and children of said Judge, and being also members of his household, were, from the 1st day of March, 1914, until after the 1st day of September, 1914, severally owners in various amounts of First Mortgage bonds of Western Pacific Railway Company, amounting in

the aggregate to approximately nine thousand (\$9,000) dollars principal amount”—

The COURT.—When was the bill filed?

Mr. HOW.—The 2d of March, 1915.

The COURT.—I knew they had disposed of them before that date; I thought that this ran into the period.

Mr. HOW.—(Continuing.) “—and a sister-in-law of said Judge, who is a member of his household, was at the same time the owner of First Mortgage bonds of said Railway Company in the principal amount of three thousand (\$3,000) dollars. I am credibly informed, and on such information state, that said bonds, three whereof seem to be the bonds mentioned by said Judge as aforesaid, were purchased by or for the persons so owning the same several years prior to said year 1914, and all thereof in or about the year 1910, and until the same were disposed of, as hereinafter stated, were owned by them. The market price of said bonds, as shown by a certain petition of said Savings Union, verified by John S. Drum, hereinafter mentioned, during the years 1910 to 1915, inclusive, were as follows: 1910: maximum 96, minimum 92; 1911: maximum 94, minimum 87; 1912: maximum 87, minimum 81; 1913: maximum 86, minimum 74; 1914: maximum 72, minimum 35; 1915: (prevailing price) January 36, February 32.

“The market price of said bonds on March 1, 1914, was approximately 68.

“I am credibly informed that all of said bonds, except said bonds belonging to the sister-in-law of said

Judge, were disposed of by or for their said owners late in the month of February, 1915, approximately one week prior to the commencement of this cause, at which time it was a matter of common knowledge that this cause was about to be commenced in this, the court of said Judge. As I am informed that the market price of said bonds at the time of said sale was approximately 33, the loss suffered by the owners of said bonds through the purchase and disposition thereof as aforesaid must necessarily have amounted to several thousand dollars. I have no positive knowledge that said bonds of the said sister-in-law of said Judge have not been disposed of by her, but I have made inquiry concerning said matters, and have been unable to ascertain that the same have been disposed of, and upon the contrary, I am informed and believe that his said sister-in-law was the owner of said bonds subsequently to the promulgation of the above-mentioned Plan of Reorganization, which was not adopted until after December 15, 1915, and that she has not deposited the same under said Plan.

“VIII.

“Said Railway Company never in any year made net earnings sufficient to pay as much as one-half of the amount due as interest upon its said First Mortgage Bonds, or to pay any of the amount payable into the sinking fund therefor. Said bonds were sold to the public largely upon the faith of the obligation assumed by the Denver Company in said Contract B to make said interest and sinking fund payments. Said bonds came into default, and the

foreclosure of said First Mortgage became necessary, because the Denver Company ceased, in March, 1915, to pay the interest upon said bonds, or to make up the deficit in interest payments thereon, although previously it had made up all such deficits. As a consequence, holders of Western Pacific First Mortgage bonds generally (both minority and majority bondholders) have felt that the Denver Company is responsible for the losses which they have suffered through the purchase and subsequent depreciation of said bonds.

“Upon the argument of said applications for writs of prohibition and *mandamus* above mentioned, counsel for said Judge, by innuendo, plainly intimated, as I am informed by counsel for the Trust Company there present, that the Trust Company (because opposed to bringing about unnecessarily a receivership of the Denver Company) was and is in collusion with the Denver Company to prevent the enforcement, or the full enforcement, of the obligation of the Denver Company with respect to said interest and sinking fund payments, and one of the counsel for said Judge in arguing said matter, and addressing the United States Circuit Court of Appeals, for the Ninth Circuit, in behalf of said Judge, said:

“ ‘When the first day of March passed, the Denver & Rio Grande owed a million and a quarter dollars in respect of its guaranty to pay that coupon interest, the date preceding the filing of the bill here involved. There was no idea of asking it to pay. It is a going concern. We have been told that if we

are ruthless we will drive it into bankruptcy. Well, if I owned any of the Western Pacific bonds which had been palmed off on me by the Denver & Rio Grande, and I couldn't get my money back, I would say, "Well, considering that I have been robbed of my money, I think the best thing that can happen to you is to be thrown into bankruptcy, so that you won't do it to anybody else another time." " "

The COURT.—Does it say I said that?

Mr. HOW.—No, your Honor, that counsel for your Honor said that in argument.

The COURT.—I was wondering where I said that, although taken in connection with other matters stated in the affidavit, I would not be surprised if he had stated that I did say that.

Mr. HOW.—(Continuing.)

“IX.

“Upon the rendition by said Judge of his opinion directing the entry of an order enjoining the prosecution by the Trust Company of said New York suit, said Judge, of his own motion, directed that the Denver Company and the Missouri Pacific Railway Company be made parties to this cause, and intimated in said opinion that the obligations of the Denver Company to the Western Pacific bondholders under Contract B should be ascertained in this cause. Subsequently, on March 6, 1916, in connection with the application for the entry of a decree in this cause above mentioned, said Judge, in the course of a colloquy with counsel, stated, or plainly implied, that in his opinion the Denver Company should, if possible, be compelled to appear as a party in this cause

and its said obligations be ascertained and if possible enforced. I quote, from said colloquy as follows:

“ ‘The COURT.— * * * I think the Court has intimated sufficiently throughout the long argument that was had, and the discussion of that order to show cause, and what it says in its opinion as well, that in its view there can be no competent marshaling or fixing of the value of this property for the purposes of sale, for the essential purpose of fixing an up-set price, without construing the extent and character of the guarantee given in that contract by the Denver & Rio Grande, because if that contract carries a right of protection to the extent that is contended on one side that it does, it might never be necessary to sell the property of the Western Pacific.

“ ‘Mr. HOW.—That protection has not been afforded; if it had been, the mortgage of the Western Pacific would not have gone in default.

“ ‘The COURT.—That does not answer the question. The question is what are the rights of the bondholders of the Western Pacific under that contract; and if they are such as are seriously claimed for them, counsel can readily perceive that if the Denver & Rio Grande can be held responsible, and is able to respond, there would be nothing left here as requiring a sale of the physical properties of this road to meet those obligations. * * *

“ ‘The COURT.—But the Court is bound itself to realize on the security that is submitted to its charge. It cannot turn over to anybody the obligation which rests upon it to marshal these assets.’

“X.

“Said Judge, at the time of the appointment of receivers in this cause, was requested by the parties thereto, no one dissenting, to appoint Warren Olney, Jr. as Receiver of the defendant Railway Company, but said Judge, of his own motion, and in order, as he explained, to have as Receiver some one with whom he was well acquainted, and in whom he had personal confidence, appointed also Frank G. Drum as a Receiver with Warren Olney, Jr., and thereafter, although it was represented to him by said Warren Olney, Jr. upon behalf of said Receivers that the then existing legal department of the Western Pacific Railway Company was adequate to the discharge of the legal duties incident to the receivership, appointed John S. Partridge counsel to the Receivers, stating, in effect, that he wished in that position a person with whom he was personally acquainted, and upon whom he could implicitly rely. As I am informed by counsel with whom I have consulted on this matter, said Judge had formerly been a partner in the firm of which said Partridge is a member, and the son of said Judge was at the time of such appointment, and still is, an attorney employed by and associated with said Partridge in his private practice.

“On the hearing on March 6, 1916 of said application for a decree of sale, which would necessarily have been for the benefit of all of the said bondholders (there being then no creditors claiming any preference over or claiming to share equally with said bondholders, except two creditors, who consented to

such decree), said Judge stated, despite the protest of counsel for the Trust Company, that he would not pass upon said application without hearing counsel for the Receivers, and made the following statement:

“ ‘The COURT.— * * * the Court is responsible for the administration of this property. Its avenue of aid and of enlightenment, is not only counsel for the respective parties, but the counsel for the Receivers and the Receivers themselves. The Court does not propose to make any order in this matter without such enlightenment as will enable it to take a course which, in its judgment, is going to redound to the safeguarding and the benefit of the bondholders of this road. * * *

“ ‘I feel that, inasmuch as these Receivers represent the Court, and through their counsel are the mouthpiece of the Court, for its information and for its guidance with reference to the rights of those whose interests have been committed to the keeping of the Court, that they have a right to be heard here. I shall most assuredly give them that right.’

“ ‘Upon the hearing of the return to said order to show cause why the prosecution of said New York suit should not be enjoined, said John S. Partridge, appearing in support of the order *nisi* which had been entered by said Judge upon his own motion, argued not only that the Denver Company should be made a party defendant to this cause, but that its said obligations could be ascertained and enforced in this cause, and that an equitable lien upon its property could be declared and enforced therein, and that, if

necessary, said First Mortgage of the Railway Company could be foreclosed as a mortgage in equity upon all of the property of the Denver Company.

“Upon said application for decree on March 6, 1916, said John S. Partridge, appearing as counsel for said Receivers, in consequence of the insistence of said Judge that he should and would require the views of said Receivers and their said counsel as to the granting or denial of said application, opposed the entry of a decree until the obligation of the Denver Company should have been adjudicated and if possible enforced.

“XI.

“On said 6th day of March, 1916, after the application for said decree, said Judge adjourned the hearing of said application until two o'clock in the afternoon of said day, for the purpose of hearing counsel for the Receivers as aforesaid, and upon the hearing of said matter later in said day, said Savings Union applied for leave to be heard concerning the fixing of an up-set price in connection with said decree—a subject concerning which, as I am informed, Courts are accustomed to receive the views of interested parties without permitting them to become parties to the cause. Thereafter said Judge continued said matter for one week, in order, as he stated, to enable said Receivers to present affidavits in connection with the same, and thereafter said Savings Union presented a petition for leave to intervene as a party to said cause, and to prosecute the same and participate therein as above stated, and in said complaint of intervention, and as ground for its applica-

tion for leave to intervene, charged, in substance, that said Reorganization Committee is controlled by the firms of Blair & Co., William Salomon & Co., and William A. Read & Co. (bankers in the city of New York); that the Trust Company is controlled by the Reorganization Committee; that said firms of bankers last mentioned had caused the Denver Company to default in the performance of its said obligations; had caused this foreclosure suit to be instituted; had caused said New York suit to be commenced,—”

The COURT.—Does it say the Court stated that?

Mr. HOW.—No. It says that is the ground of the claim of the Savings Union Bank & Trust Company for leave to intervene, as set forth in its petition for intervention.

The COURT.—Oh, yes.

Mr. HOW.—(Continuing.) “—and had taken all said proceedings for the purpose of enabling the Denver Company to escape the performance of its obligations to Western Pacific bondholders under Contract B, and for the purpose of defeating any claim that might be made that the claims of the Western Pacific bondholders under Contract B constituted an equitable lien upon the property of the Denver Company in priority to the liens of said Company’s First and Refunding Mortgage, and said Company’s Adjustment Mortgage; that said firm of bankers were interested, directly or indirectly, in the bonds of the Denver Company secured by said First and Refunding Mortgage and said Adjustment Mortgage, and entertained the purpose of protecting said bonds as against the interests of Western Pacific

bondholders represented by the Reorganization Committee and the Trust Company; and that the Reorganization Committee and the Trust Company are betraying the interests of their respective *cestuis que trustent*.

“Upon the hearing of said applications for writs of prohibition and *mandamus* in the United States Circuit Court of Appeals, counsel for said Judge argued that one reason why said Judge should not be compelled to enter a decree of foreclosure and sale in this cause is that said application of the Savings Union for leave to intervene and file said complaint had been made, and the clear implication of said argument was that said application ought to be and would be granted by said Judge and so granted because the Trust Company had shown unfairness and partiality in the administration of its trust, and did not and could not properly represent the minority bondholders in the prosecution of this cause. In the defense of said applications for writs of prohibition and *mandamus*, and in the argument thereof, counsel for said Savings Union, and counsel for said Judge, co-operated, and despite the fact that said charges of fraudulent conspiracy made in said proposed complaint in intervention were repeated in open court by counsel for said Savings Union, in the presence of counsel for said Judge, said statements were in no way repudiated by counsel for said Judge, or doubt concerning the same expressed, but, upon the contrary, the attitude of counsel for said Judge upon said hearing was one acquiescence in and of endeavor to support said charges.

XII.

Said applications for writs of prohibition and *mandamus* were heard in connection with an appeal taken by the Trust Company from the order of this Court, entered upon the opinion of said Judge, enjoining the Trust Company from prosecuting said New York suit, and directing the bringing as parties defendant of the Denver Company and said Missouri Pacific Railway Company. Said Receivers not being parties to said cause were not cited to appear as appellees upon said appeal, and, although the hearing of said appeal in connection with the application for said writs of prohibition and *mandamus* was consented to by all of the parties to said cause, the same was not consented to by said Receivers. Upon the contrary, at the time that the Trust Company was about to take its said appeal from the order of said Judge enjoining the prosecution of said New York suit, counsel for the Trust Company applied to said John S. Partridge, as counsel for said Receivers, to join all of the said parties to this cause in waiving the issuance of citation upon said appeal, and in stipulating that said cause might be heard on March 16, 1916, together with the applications for said writs of prohibition and *mandamus*; but said John S. Partridge notified counsel for the Trust Company that, after consultation with Garret W. McEnerney, Esq., special counsel for said Receivers and for said Judge, he had decided that it would not be advisable to enter into such stipulation, and refused so to do. Prior to the hearing of said appeal and said applications, said Judge entered

ex parte an order in this cause, directing counsel for said Receivers to appear upon said appeal, and to oppose the same, the body of which said order reads as follows:

“It appearing that the Equitable Trust Company of New York, plaintiff in the above-entitled cause, has taken an appeal from an order enjoining said The Equitable Trust Company from further proceeding with a certain ancillary and dependent action in the Southern District of New York;

And it appearing that the Receivers heretofore appointed in this cause have not been made parties to said appeal;

It is ordered that said Receivers be, and they are hereby authorized and directed to take any steps they may deem necessary to protect the jurisdiction of this Court upon the said appeal.

WM. C. VAN FLEET,
United States District Judge.”

Although none of the parties to said cause objected to the hearing of said appeal or to the reversal of said order for injunction, said counsel for said receivers, acting in real substance, as counsel for said Judge appeared upon the hearing thereof and moved to dismiss said appeal and argued in support of said order.

And said Judge authorized counsel for the Receivers, and Garret W. McEnerney, Esq., a member of the San Francisco bar, to represent him in opposition to said applications for said writs of prohibition and *mandamus*, although said applications were not opposed by any of the parties to said cause.

Upon the hearing of said appeal and said applications, said counsel moved to dismiss said appeal upon the ground that the Receivers had not been made parties thereto or cited to appear thereon, and opposed the consideration of said appeal, upon the ground that the Court had not jurisdiction to review said injunctive order, because, as said Judge contended, said order constituted discipline for contempt and was not an injunction in the proper sense of that term, and opposed the consideration of said applications for said writs of prohibition and *mandamus*, upon the ground that the United States Circuit Court of Appeals had not jurisdiction to entertain the same, in all said matters indicating the plain intention of said Judge (notwithstanding a desire previously expressed by him, and which should have been entertained by him to obtain the judgment of said United States Circuit Court of Appeals concerning his jurisdiction to initiate and adjudicate herein said controversy concerning said claims against the Denver Company and to postpone a decree in this said cause until such controversy had been adjudicated), to prevent the expression of the judgment of said Circuit Court of Appeals upon said questions and to proceed with said cause irrespective of the propriety or impropriety of the course which he had determined to adopt with reference to said matters.

Upon consideration of the facts as I have learned the same from an examination of the records in this cause, and in said Circuit Court of Appeals, and of the facts outside said records above stated, I am

convinced and believe that said Judge is determined, if there be any way available to him so to do, to compel the prosecution of said claims against the Denver Company before him in this cause, and that he entertains a deep resentment against said Denver Company, and that he believes (although, as I verily believe, there is no foundation whatsoever for the belief), that said banking houses above named have conspired, as is charged by said Savings Union, to protect the Denver Company and the holders of certain of its bonds, against the claims of Western Pacific bondholders, at least in some part, and that said Reorganization Committee and the Trust Company are co-operating with them in so doing and that the Trust Company intends (although such is not its intention) to endeavor to secure an unduly low up-set price to be fixed by the decree herein, that said Judge has acquired and entertains a personal bias and prejudice against it on account of said matters and things, as well as the other matters and things hereinabove recited.

XIII.

Said Plan of Reorganization was adopted by said Reorganization Committee on December 17, 1915. A copy of said Plan and the Agreement annexed thereto was delivered by one of the counsel for the Reorganization Committee to said Judge, and a copy thereof to each of said Receivers, on or prior to December 24, 1915. Immediately thereafter, formal notices of the adoption of said Plan were published in various newspapers in the State of California, and lengthy summaries thereof and comments

thereon were published in most of the principal newspapers of said State, and particularly in the daily papers of San Francisco. Letters and notices were mailed by the Reorganization Committee to every bondholder whose name appeared upon the income tax certificate lists in the possession of the Trust Company, urging deposits of bonds under said Plan of Reorganization, and inasmuch as the names of the members of the family and household of said Judge who were holders of said bonds prior to the sale thereof in February, 1915, hereinabove mentioned, do appear upon said list, undoubtedly said circular letters were received by various members of the family and household of said Judge, and inasmuch as the said sister-in-law of said Judge was a holder of some of said bonds after the date of the promulgation of said Plan, and unquestionably received said circular letters, and a copy of said Plan was in the possession of said Judge, a knowledge of the contents of said Plan must necessarily have been acquired by said Judge.

Notice that the time for withdrawal of bonds deposited with the Protective Committee, which was the predecessor of said Reorganization Committee in representation of said bondholders, would expire six weeks from the date of the first publication of said Plan, to wit, on February 4, 1916, also was duly published as aforesaid, and notice that the time for deposits thereunder would expire on February 7, 1916, was so published, and was contained in said Plan. Immediately after said last-mentioned date the fact that a very large majority of said bonds,

to wit, about \$43,000,000, had become subject to said Plan and Agreement of Reorganization, was published throughout the United States, and particularly in the city and county of San Francisco. The fact also that the financial requirements of said Plan, amounting to \$18,000,000 in cash, had been fully underwritten, and money necessary for the carrying out of said Plan, and particularly for the extension of the lines of Western Pacific Railway Company in the State of California, and for the rehabilitation and betterment of its existing lines had been provided, was also so published, and was a matter of common knowledge. It also appeared by reference to said Plan, and the fact was published generally in the papers of the city and county of San Francisco, and was a matter of common knowledge, that if said Plan was to be carried into execution it would be necessary that the same be declared operative by said Reorganization Committee before March 15, 1916, and that if it should not be declared operative before said date it would cease to be binding upon the depositors thereunder and all such depositors would be at liberty to withdraw their bonds therefrom and said Plan would fail.

During the period which elapsed between December 24, 1915, and February 21, 1916, neither the Trust Company, nor any of the counsel for the Trust Company or said Reorganization Committee, nor anyone connected with any thereof, so far as I have been able to ascertain, ever was apprised in any manner that there was, or would be, any active opposition to the carrying out of said Plan. It was a matter

of common and necessary knowledge that a prerequisite to carrying out the same was the entry of a decree of foreclosure and sale in this said cause, and there was never, as I am informed and believe, any intimation during said interval that there would be any objection upon the part either of said Judge or of said Receivers, or of counsel for said Receivers, to the entry of such decree of foreclosure and sale.

Said Plan of Reorganization contemplate the sale under the decree of foreclosure and sale to be entered in this said cause of the rights of Western Pacific Railway Company as such under said Contract B, that is to say, rights under the traffic and trackage provisions of said Contract B, in *connection* said railway's other property, but does not require or contemplate in any contingency the sale of any of the rights of the holders of the bonds of said company, either with respect to interest payments or sinking fund payments at any such sale, or in this cause at all, and I am advised by counsel for the Trust Company and said Reorganization Committee that there is no reason whatsoever, if said Judge were willing to direct such course to be pursued, that the said rights of Western Pacific Railway Company, whatsoever the same may be, should not be so disposed of (the rights of said bondholders surviving), and that in such event no bondholder will be prevented from causing his own claims to be enforced thereafter by the Trust Company, as Trustee, under said Contract B, and that if said Judge is of the opinion that the claims of said bondholders against said Denver Company should be ascertained by him, or

even enforced in this cause, proceedings to that end, if they be warranted at all, may be taken as well after decree of foreclosure and sale as before such decree.

Nevertheless, on February 21, 1916, said Judge, without allowing any party to this cause any opportunity to be heard concerning the desirability or consequence of such action upon the execution of said Plan of Reorganization, and notwithstanding that the prosecution of said New York suit had already been and then was stayed by a restraining order issued by said Judge at his own instance, and that said Judge had been advised by the petition of one S. C. Wright filed herein and on the same day denied by said Judge, of the Purpose of the Trust Company to apply for a decree of sale herein in advance of any attempt to enforce the claims of bondholders against the Denver Company under Contract B, delivered an opinion in the proceeding to enjoin the Trust Company from proceeding with said New York suit, wherein he directed an order to be entered enjoining said suit, and that said Denver Company and Missouri Pacific Railway Company be made parties defendant to this cause, and indicated his opinion that the obligations of said Denver Company to said bondholders under Contract B must be ascertained, and possibly enforced in this cause. In a colloquy between counsel for the Reorganization Committee and the Judge, there was also an intimation, although not very distinct, that said Judge would require said matters to be adjudicated in this cause before he would permit a decree of foreclosure

and sale to be entered therein.

At the time the opinion of said Judge was handed down, one of the counsel for the Reorganization Committee suggested to said Judge that the effect of the entry of the order directed in said decision so far as it would initiate new proceedings and would require new parties to be brought in, might be to interfere very seriously with the carrying out of said Plan of Reorganization, and would jeopardize the success of the same, and requested said Judge to delay the entry of that portion of said order until a hearing could be had, and a showing made to him, of the interest of the bondholders as a whole to have said Plan carried out and of the effect upon the success thereof of the order which said Judge proposed to enter. Said Judge, however, peremptorily refused to delay the entry of said order, or any part thereof, and directed the same to be entered, and directed counsel for said Receivers to cause the same to be served upon the said Denver Company and said Missouri Pacific Railway Company, and said companies to be brought into said cause as parties defendant thereto.

Subsequently, and in order that, if possible, an early decree of foreclosure and sale might be had in the said cause, as was absolutely requisite to the execution of said Plan of Reorganization, and in order that the parties in interest might be advised, as it was essential that they should be, whether said Judge would in fact permit a decree of foreclosure and sale to be entered with reasonable promptness, counsel for the Trust Company prepared and, as

hereinbefore stated, on March 6, 1916, caused to be presented to said Judge in open court a form of decree of foreclosure and sale, which said counsel had previously presented to all of the other parties to this cause, and to the only creditors claiming preferences therein, who, without exception, had consented and stipulated to the prompt entry thereof. Upon the hearing upon said application said Judge refused to enter said decree, stating, in effect, that until the United States Circuit Court of Appeals of the Ninth Circuit had disposed of said application for a writ of prohibition, which had been made between February and March 6, 1916, he would not pass upon the application for decree, and, in effect, that if his jurisdiction to adjudicate said claims against the Denver Company in this said cause was not denied by the Circuit Court of Appeals after hearing said application, he would not direct the entry of any decree until the matters of the bondholders' claim against said Denver Company should be disposed of by him. At the same time, said Judge, although requested so to do, refused either to direct the entry of said decree, or to deny the application for the entry thereof, although the suggestion that an order denying said application might be made was made to him with the avowed purpose that such denial of said application might be reviewed upon the merits by the United States Circuit Court of Appeals on a proceeding for *mandamus*. Said Judge manifestly intended to prevent such review, and the expression of the views of said Circuit Court of Appeals concerning the right of the parties to the entry of said decree.

From a consideration of the facts aforesaid, and also of the proceedings which have been taken, as stated elsewhere in this affidavit, to prevent the rendition of any judgment by the Circuit Court of Appeals preventing said Judge from carrying out his purpose to compel a litigation of said matters with said Denver Company in this court and cause, and compelling said Judge to enter a proper decree of foreclosure and sale herein, I am convinced that said Judge rendered said decision, and refused to permit the entry of said decree in the full belief that his said action would probably defeat the carrying out of said Plan of Reorganization and with the desire that such should be the result thereof, and that said Judge is personally opposed to said Plan of Reorganization, and is determined to defeat the same.

As in this affidavit above stated, said Judge is aware that the Trust Company, as in duty bound, has co-operated, in various proper ways, with said Reorganization Committee in the endeavor to carry out said Plan of Reorganization, and identifies said Trust Company with said Reorganization Committee, and believes that it is a partisan of said Plan, and of the bondholders who have joined therein, and I verily believe he has a personal prejudice against the Trust Company by reason, among other things, of its said co-operation with the Reorganization Committee in the endeavor to carry out said Plan of Reorganization.

XIV.

At various times during the administration of the receivership in this cause, as I am informed by coun-

sel for the Trust Company, counsel for the Receivers have submitted to the Court applications for orders authorizing the Receivers to adopt contracts, leases, or other arrangements, made by the Railway Company with third parties, and also applications for orders authorizing the Receivers to enter into contracts, leases, or other arrangements with third parties, for or in connection with the use of property. Upon said applications counsel for complainant, who has appeared thereon, has frequently objected to the making of any such order if the same purported to operate, or if the same could operate by their own force, beyond the period of the receivership. When such objections were originally made by counsel, said John S. Partridge, as counsel for the Receivers, took the position that said orders could, would and should so operate, but said Judge, after considering the question, stated that, in his opinion, the proper construction of said orders should be that they would not operate except during the period of the Court's control of the property through its Receivers, unless they should expressly provide to the contrary. Counsel for the complainant requested the Court either to incorporate such statement in each order, or to enter a standing order directing that such construction should be given to every such order in absence of a contrary declaration in the order itself. Said Judge, notwithstanding the fact that he had expressed the view above stated with respect to the proper construction of such orders and that said John S. Partridge had previously expressed a contrary view and that said orders did not by their terms contain any limitation,

stated that he would incorporate such statements in said orders, or make such standing orders, if, but not unless, said John S. Partridge as such counsel would consent thereto.

Shortly after said Judge, upon his own motion, directed the issuance of an order in this cause restraining the Trust Company from prosecuting said New York suit, pending decision upon the order to show cause why an injunction should not issue, counsel for the Reorganization Committee called upon said Judge at his chambers, and represented to said Judge that the primary object of maintaining said bill in New York was to obtain an injunction restraining the prosecution of suits against the Denver Company by individual bondholders suing upon direct guaranties, to the detriment of all other bondholders, and that the restraining order made in this proceeding was so broad that even this limited object could not be accomplished and said counsel suggested to the Judge that it was to the best interests of the bondholders as a whole so to modify the restraining order as to permit proceedings to be taken in the New York jurisdiction, for the sole purpose of obtaining injunctions against such suits by individual bondholders against the Denver Company which might create preferences or otherwise result in embarrassment to the bondholders as a whole, and counsel stated that the modification of the restraining order so as to permit injunctions to be issued against individual bondholders would further that end. The said Judge, nevertheless, stated that he would not make any order modifying the restraining order in any manner, unless such modification were con-

sented to by counsel for the Receivers, but also stated that if such modification were so consented to, the same would be made.

XV.

By reason of the facts above stated with respect to and connected with the appointment of said Frank G. Drumm as one of the Receivers of Western Pacific Railway Company, and the appointment of said John S. Partridge as counsel for said Receivers, and the action of said Judge in instituting, and of said Partridge in prosecuting, said injunction proceedings to restrain the prosecution of said New York suit, and the suggestion by said Partridge in argument of proceedings for bringing in the Denver Company as a party defendant in this cause, and the action of said Judge, of his own motion, in directing the same, and the declared purpose of both said Judge and said Partridge to compel an adjudication upon said claims against said Denver Company before the entry of decree herein, and the expressions of said Judge, hereinabove related, with respect to relying upon said Receivers and said counsel, and looking to them for information and guidance, and the action of said Judge, hereinabove related, in confiding the defense of said applications for writs of prohibition and *mandamus* to counsel for said Receivers, and particularly said John S. Partridge, and in directing said counsel to oppose the consideration of said appeal, and in permitting his said counsel to co-operate upon the hearing of said applications for writs of prohibition and *mandamus* with said Savings Union and its counsel, and

of the action of said Judge in submitting his judgment to, and following the wishes of, said John S. Partridge as counsel for said Receivers in said matters last above mentioned, I am led to believe, and do believe, that said Judge has a personal bias and prejudice in favor of said Receivers and their said counsel, as well as against the Trust Company.

XVI.

The complaint in intervention of said Savings Union was made and presented to the Court at the instance of John S. Drum, Esq., who is the president of said Savings Union and a stockholder therein, and who verified said complaint. Said John S. Drum is the younger brother of Frank G. Drum, who, as above stated, is one of the Receivers of the Railway Company appointed by said Judge, and one of the especially trusted representatives and confidential advisers of said Judge.

The hearing of the said appeal from the injunction directed by said Judge against the prosecutions of said New York suit, and upon said application for writs of prohibition and *mandamus*, took place before the United States Circuit Court of Appeals, for the Ninth Circuit, sitting in the city and county of San Francisco. At the opening of court on Thursday, the 16th day of March, 1916, counsel for said Savings Union stated to the Court that in connection with the applications for the writs of prohibition and *mandamus* he appeared on behalf of said Savings Union, and asked leave to file a petition in opposition to the issuance of the writ of prohibition, and asked that it might be argued in connection with

the whole matter, and the fact that an application of the Savings Union for leave to intervene in this said cause had been made was referred to by counsel for said Judge as a ground of objection upon his part to the granting of the writ of prohibition, and more particularly the writ of *mandamus* then applied for in said United States Circuit Court of Appeals, and both said facts were referred to in said newspapers, and must necessarily have come to the knowledge of said Judge. On Friday, March 17, 1916, counsel for said Savings Union again appeared, co-operating and as if associated with counsel for said Judge, and argued at length in support of their said petition for leave to intervene, making various charges of fraud and bad faith against the Trust Company, and those with whom said counsel alleged the Trust Company had co-operated in respect to its actions as Trustee under said Mortgage and under said Contract B. No protest was made by said Judge, or his counsel, against this proceeding upon the part of said Savings Union, but counsel for said Judge, not only by so relying upon the existence of said application, but also by endeavoring in argument, as elsewhere stated herein to create the impression that said complaint in intervention and the charges of fraud made therein were justified, and by insinuating that said Judge might have acted as he did because he had inferred upon his own account the truth of the frauds so charged, by implication and innuendo supported such charges of fraud, and in effect said action of said Savings Union. Wherefore, I am led to believe, and do believe, and so

charge, that said Judge has a personal bias and prejudice in favor of said Savings Union.

XVII.

“This affidavit was not filed ten days before the beginning of the pending term of court of said United States District Court, for the Northern District of California, to wit, prior to March 6, 1916, for the following reasons:

“The plaintiff is a New York corporation, having its principal offices in the city of New York, where I reside, and having no branch offices or representatives in the city and county of San Francisco, or in the portion of the United States west of the city of New York; that none of the facts and things herein stated, other than the general course of the proceedings in said cause, the appointment of said Frank G. Drum as one of said Receivers, the appointment of said John S. Partridge as attorney for the said Receivers, and the rendition of the opinion of said Judge on February 21, 1916, and the fact that said Judge and counsel for said Receivers had apparently taken umbrage to some extent, on account of the prosecution of said New York suit without said Judge’s permission, were known to the Trust Company, or any of its officers or agents until after March 6, 1916; that, as I am informed by counsel for the Trust Company, Jared How, Esq., one of said counsel, resident in San Francisco, was familiar prior to March 6, 1916; with the matters above stated which had occurred prior to said day. He, nevertheless, believed, as he has informed me, that in spite thereof said Judge could not and would not refuse to enter a

proper decree in this cause whenever the same should be ready for decree, or if all of the parties thereto should stipulate for the entry of such decree, and that despite the fact that there was contained in the opinion of said Judge rendered on the 21st day of February, 1916, an intimation that he considered it necessary that the obligations of the Denver Company should be enforced in this cause, there was not then any clear intimation that he considered it essential that the same should be so enforced prior to the entry of decree of foreclosure and sale herein, and that said counsel believed that whenever an application for a decree, consented to by all parties to said cause, should be presented to said Judge, he would be bound to grant the same, whether or not he should determine to proceed in the cause with the prosecution of said claims against the Denver Company; and that it was not until after the refusal of said Judge to proceed to decree in said cause on March 6, 1916, that counsel for the Trust Company had any clear ground for the belief that the personal bias and prejudice of said Judge was influencing him and might continue to influence him in his conduct and decisions in said cause to the substantial and irreparable injury of the interests of the bondholders of the Railway Company and of the Trust Company as their Trustee; and it was not until after the complaint in intervention of the Savings Union had been filed in the District Court, and the charges of fraud and bad faith therein contained had been put forward in argument before the United States Circuit Court of Appeals on the 16th and 17th days of

March, 1916, and had been acquiesced in, and apparently approved by counsel for said Hon. William C. Van Fleet (said counsel then and there collaborating with counsel for the proposed intervenor), as justifying the action taken by said Judge before any such charges were made, that any director, officer or agent of, or counsel for, the Trust Company became fully convinced that said Hon. William C. Van Fleet had a personal bias and prejudice against the complainant herein, which would cause him to persist in denying to the complainant the relief to which he is entitled in said cause and so seriously influence him therein as to make it the duty of the Trust Company to cause an affidavit of prejudice to be filed herein. Shortly after receiving information of the action of said Judge on said 6th day of March, 1916, from its counsel in San Francisco and forthwith upon receiving information that said Savings Union had on March 13, 1916, applied for leave to intervene in said cause and file herein its said complaint in intervention and of the character of said complaint and that the apparent purpose thereof and of said Judge was to postpone indefinitely the entry herein of a decree of foreclosure and sale and being requested so to do by the President and New York counsel of the Trust Company, on March 14, 1916, I left the city of New York and went directly to the city of San Francisco, arriving therein on the 18th day of March, 1916. I forthwith proceeded to interview various persons, and particularly the counsel for the Trust Company present in San Francisco, and the counsel for the Reorganization Committee present in said city, and

to examine the various papers and documents in this cause herein referred to, and by such inquiry and investigation familiarized myself with the facts and circumstances hereinabove set forth. As a result of such inquiries and investigation, I became satisfied that such personal bias and prejudice on the part of said Judge does exist and that it would be impossible by reason of the same for the complainant herein to obtain a fair consideration for and reasonably prompt enforcement of its rights and the rights of all said bondholders while said Judge should remain in control of said cause or the administration of said receivership herein and that it was necessary and the duty of the Trust Company to cause this affidavit to be filed herein. Nevertheless, I was advised by counsel for the Trust Company that, inasmuch as said applications for writs of prohibition and *mandamus* had been submitted to said Circuit Court of Appeals and at least the question of the power of said Judge to compel the litigation of said claims of said bondholders against the Denver Company and to postpone the entry of a decree herein until the conclusion of such litigation had been submitted thereupon to said Circuit Court of Appeals, it would not be proper to file this or any such affidavit, until after the decision thereon of said Circuit Court of Appeals should be rendered unless it should be necessary so to do in order to prevent said Judge from enacting in the meantime with respect to some one or more of said controverted matters hereinabove mentioned. On March 20, 1916, said Judge announced that he would not act in such matters until the decision of said Circuit Court of Appeals should be ren-

dered and thereupon I returned to the city of New York and reported the facts stated in this affidavit, and the other facts and opinions which I had gotten concerning the attitude and conduct of said Judge to the President and Executive Committee of the Trust Company. Thereafter and at the first meeting of said Executive Committee held after my return, to wit, on March 29, 1916, the Executive Committee considered my said report and also a resolution which on March 20th, 1916, had been adopted by said Reorganization Committee requesting the Trust Company so to do and thereupon adopted a resolution authorizing the execution of an affidavit of bias and prejudice in such form as should be approved by counsel for the Trust Company under my supervision, and requesting me to verify the same and cause the same to be filed not only as my individual act but upon behalf of the Trust Company and therein to insist that said Judge shall proceed no further in this said cause and otherwise as hereinbelow prayed. Accordingly I have, at this my earliest opportunity thereafter, verified this affidavit, which has been so approved by said counsel.

WHEREFORE, I individually, and on behalf and as the authorized officer of said complainant, the Equitable Trust Company of New York, do now and hereby pray and insist that said Judge, the Hon. William C. Van Fleet, shall proceed no further in this said cause, or in any matter arising therein, and that another Judge shall be designated therefor, in the manner by law prescribed, and that said Judge shall cause the fact of this affidavit and

application to be entered on the records of the Court, and also an order that an authenticated copy hereof shall be forthwith certified to the Senior Circuit Judge for the Ninth Circuit, then present in said Circuit; and for such further proceedings as are prescribed by law.

LYMAN RHOADES.

Subscribed and sworn to before me this 29th day of March, 1916.

[Notarial Seal]. MYLES M. BURKE,
Notary Public, New York County, No. 222, Reg-
ister's Office No. 6148.

Term expires March 30, 1916.

I HEREBY CERTIFY that I am the counsel of record of the complainant in the above-entitled cause, The Equitable Trust Company of New York, as Trustee, and that I reside in the city of San Francisco, and am a member of the bar of the United States District Court, for the Northern District of California, and that I am familiar with the proceedings in said cause, and have read the affidavit of Lyman Rhoades, to which this certificate is appended, and that such affidavit and application are made in good faith.

JARED HOW,

Counsel of Record for said complainant, the Equitable Trust Company of New York."

Now, I suggest again to the Court the procedure under sections 21 and 20 of the Judicial Code, and I submit a form of an order certifying the fact of the filing of this affidavit and application.

The COURT.—Is it your view that *ipso facto* the

filing of this affidavit, without regard to the truth of the matters stated, disqualification ensues?

Mr. HOW.—I do think there can be no doubt as to the meaning of the Statute upon that, your Honor.

The COURT.—It has been construed by the Federal Courts otherwise.

Mr. HOW.—It has?

The COURT.—Yes. I think you will find in a note to the Judicial Code that the facts must be such as in their nature tend to show disqualification; but, Mr. How, very clearly I don't suppose that anyone would say that where an affidavit assails the Judge in a respect in which he is utterly unconscious of being at fault, and especially where it assails him with reference to personal matters dragged in for the purpose of embarrassing him in the administration of the case apparently he would be expected to sit silent and not answer the affidavit. I certainly have a right to place myself right before the public.

Mr. HOW.—I should assume, your Honor, that the right to answer the affidavit must be conceded but I should assume that the matter of the determination of the fact of disqualification would rest with the Circuit Judge—perhaps the Senior Circuit Judge.

The COURT.—I doubt that. I think it would have to rest with the Circuit Court of Appeals.

Mr. HOW.—The case of *Henry v. Spear*, 201 Fed. 869, is the only case I know of under this section of the statute.

The COURT.—You will find two or three cited in the note to those sections in the Judicial Code.

Mr. HOW.—The amendment I think is the amendment of 1913 as the code now stands, but for your Honor's assistance, and as this is very short, I will read the paragraph upon this point:

“Upon the making and filing by a party of an affidavit under the provisions of section 21, of necessity there is imposed upon the Judge the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and to determine its legal sufficiency. If he finds it to be legally sufficient then he has no other or further duty to perform than that prescribed in section 20 of the Judicial Code. He is relieved from the delicate and trying duty of deciding upon the question of his own disqualification.”

Mr. PARTRIDGE.—Where is that, Mr. How?

Mr. HOW.— 201 Federal 869.

The COURT.—I think, Mr. How, I certainly would be inclined to have the judgment of my own Circuit Court of Appeals upon the subject after a proper answer made to the matters which it is claimed tend to show prejudice.

Mr. HOW.—Your Honor, I have no further duty to perform and cannot be of any more assistance to the Court.

Mr. MADISON.—If your Honor please, the Savings Union Bank & Trust Company has up this morning an amended petition for leave to intervene here for the purpose of being made a party to the

record for the purpose of introducing evidence in order to aid the Court in arriving at an up-set price. As I understand it, the only point now before this Court at the present time, assuming that the Circuit Court of Appeals' opinion is final will be the signing of a decree and fixing an up-set price. The plaintiff in the case admits that there should be an up-set price fixed, and the affidavit so recites. All the parties to the case agree that there should be an up-set price—

Mr. HOW.—Don't claim that I am bound by any such statement as that. I don't admit it. I don't think it is a proper case for an up-set price, never have and shall not to the end. I think the Court has the power to fix an up-set price.

Mr. MADISON.—The proposed decree drawn up by Mr. How and submitted by Mr. How on behalf of the Equitable Trust Company contains a provision providing for an up-set price and simply leaving a blank for the amount to be filled in. Am I correct about that, Mr. How?

Mr. HOW.—Quite correct.

Mr. MADISON.—And at the time this matter was presented Mr. How said he thought it was a proper case for an up-set price. He had nothing to say however upon that point.

I think this is a case where an up-set price should be fixed and I would be glad to argue that point at the proper time. There is no objection, as I can see, to the form of the decree and nothing before the Court but the fixing of the up-set price.

This affidavit seems to me to be the most remark-

able that I, in my experience, have listened to. It states that it is the duty and it is the purpose of the Reorganization Committee to get the lowest possible price, to have this property sold for the lowest possible price, that it is in its interest to do so and it intends to do so—

Mr. HOW.—Mr. Madison, may I interrupt you a moment?

Mr. MADISON.—Yes.

Mr. HOW.—Your Honor, I feel it is my duty, not knowing just what counsel for this applicant is proceeding to, it is my duty to protest against this Court hearing any further proceedings of any character in this court.

The COURT.—Enter the protest of record, proceed, Mr. Madison.

Mr. MADISON.—The affidavit recites that it is the purpose, the desire and the intention of the Reorganization Committee to have this property sold at the lowest possible price; on the other hand, that it is in the interest and the desire of the dissenting bondholders who have not joined this Reorganization Committee to have it sold at the highest possible price. Therefore there is an irreconcilable conflict between the bondholders who have joined in this Reorganization Plan and those who have not. He says it is the duty of the Equitable Trust Company, which makes this affidavit, to stand aloof and that it is doing so and intends to do so. And yet in this case, if your Honor please, the record shows that the President of the Equitable Trust Company is the Chairman of the Reorganization

Committee; and the record in this case shows, if your Honor please, that the Vice-president of the Equitable Trust Company, the man who swears to this affidavit, is acting as the Secretary of the Reorganization Committee. Now, is there any question that if the President and the Vice-president of the Trust Company are acting as the Chairman and the Secretary of the Reorganization Committee, that they are acting together?

Now, as I say, we have before the Court an application for leave to intervene for the purpose of being made a party to the record in order that we may introduce proper evidence, that we may subpoena witnesses that we may be heard upon matters relating to the fixing of this up-set price.

The Trust Company has filed an answer here, in which it alleges that it intends to and will act in accordance with the wishes of the majority.

So the minority have nobody representing them before the Court.

I have a number of cases here and I would like to argue the question to the Court with respect to mortgage foreclosures of railroads but the only question I have in mind is whether the Court should act upon that matter while this other matter is pending.

The COURT.—The opinion of the Circuit Court of Appeals, as I read it in a more or less cursory way because I have not had a copy furnished me, contemplates that the minority bondholders may be heard on the question of an up-set price; they may appear here and introduce evidence as to value, and so forth. Does that render it necessary for that

purpose that they be allowed to intervene?

Mr. MADISON.—Yes, sir. I have authorities on that point. Not only that they have the right to intervene, if your Honor please, but that it is prejudicial error to refuse to make them parties to the record. I have cases under just such like circumstances.

The COURT.—It seems to me, Mr. Madison, it would not be proper for the Court to proceed at this time and make any order in the face of this affidavit challenging its authority to sit here by reason of bias and prejudice. I think the first thing should be that the Judge of the Court be given an opportunity to answer that affidavit.

Mr. MADISON.—I submit then that both matters stand over together.

The COURT.—Because I do not accede at all to the proposition that *ipso facto* upon the filing of such an affidavit the Court is absolutely powerless to protect itself against aspersion cast in as formal and solemn a way as by a written affidavit such as this: and certainly it does seem to me that if the Court were to permit itself to be driven from what it conceives to be its duty by such an attack without any response it would certainly be subject to the characterization of being cowardly; I don't think anybody has ever accused me of being that in the performance of my duty. I certainly shall undertake to answer any and all matters which are advanced here to refute the existence of a prejudice which I absolutely am unconscious of. Now, we are not always conscious of the workings of our own mental processes.

Sometimes we are actuated by things that we are not actually mentally conscious of; but certainly I am not aware of the existence upon my part of the slightest degree of feeling or prejudice which would preclude me from doing equal and exact justice between these parties. And I doubt seriously if counsel—any of the counsel engaged in this case that have taken views opposite to those expressed by this Court would willingly stand up and personally intimate that they believed the Court was actuated by prejudice. Very clearly it seems to me the mere action of the Court in passing upon the matters before it reaching a conclusion at variance with the views of counsel is not of a character upon which to predicate prejudice—I mean in and of themselves. I certainly expect to fully answer this affidavit and show, if I may, the absolute and entire absence of any sentiment, feeling or actuating motive that could in any wise be characterized as prejudice in this case. What this Court has done it has done with the single and the sole purpose of trying to perform its duty in such a way under the conception that that was its duty as to conserve the rights of everybody concerned in this property which has been submitted to its charge, and to so do it that no man could go forth to the world and say that his rights however insignificant as compared with those holding greater had not been fully protected by this Court. That has been the motive and the purpose of this Court. It does not propose to be driven from the execution of those duties which fall to it by reason of the place it holds unless it is found that the mere filing of

this affidavit without determining the question of whether or not it is sufficient in substance to dislodge prejudice such as to preclude this Court from acting is of that fiat character as to disarm this Court of jurisdiction *ipso facto*.

Mr. MADISON.—I don't take it, if your Honor please, that anyone can have any doubt about those matters, or about your Honor's desire always in connection with this matter to protect the bondholders as a whole and not to act simply because a Reorganization Committee has requested action.

The COURT.—That affidavit purports to have been sworn to in New York but it has facts recited in it which must necessarily have been put into it here.

Mr. MADISON.—My point at the present time is simply that my application for leave to intervene may keep along with this other matter.

The COURT.—Oh, yes. I will put the matters over, including—do you want to be heard, Mr. Partridge?

Mr. PARTRIDGE.—Yes, if your Honor please, solely on the question of the method of procedure. Section 21 of the Judicial Code provides that not only must the party state the bias and prejudice of the Judge but he must set out the facts and the reasons for the belief that such bias or prejudice exists. This matter has just come up this morning. As usual these gentlemen did not even do me the courtesy of serving me with a copy or letting me know that the thing was going to break in this outrageous way; but as I understand the statute—

The COURT.—I can suggest to you that counsel sent it to my chambers for my private perusal but I refused to have it left there and directed that it be presented in open court.

Mr. HOW.—I received it only this morning and had no copy.

Mr. PARTRIDGE.—Well, Mr. How, it is not the first time—as long as we are on the subject. At any rate, it seems to me—without examining into it at all, it does seem that the filing of the affidavit will divest the Court of any jurisdiction to proceed any further until the questions involved in the affidavit are determined.

The COURT.—I should imagine that must be so.

Mr. PARTRIDGE.—Yes. However, this case cited by Mr. How points out conclusively that then the duty devolves upon the Judge of the court to determine from the terms of the affidavit itself whether or not the matters therein set forth are such as to constitute a personal bias and prejudice; and therefore if the Court finds that it is legally sufficient to constitute in his mind a bias and a personal bias against the complaining party the court then has nothing to do but to pass the matter up to the presiding Judge. Therefore it is clear even from that very meagre and skeleton diffusion that it is your Honor's duty to examine this affidavit and determine whether or not, taking it all to be true—and of course most of it is untrue, but taking it all to be true, whether or not it would constitute matters which would bias your Honor against the plaintiff or the complainant in this case.

Now, if your Honor please, as I understand it, the affidavit when you boil it all down and strip it of those portions of it which are venomous and stripping it of those portions of it which are manifestly on the face of the record untrue it comes down to this, that the evidence of bias and prejudice in your Honor's mind consists in the simple fact that you have endeavored to do your duty by construing the law and Contract B. as you found it. Now then, I may be wrong about that; as I say, I have just heard of this since I came into court this morning; but if that be so, then your Honor will determine that that affidavit does not constitute it a cause to send it to the presiding Judge under the statute. If you find that those matters are such that in their nature they might be construed to be prejudice in your Honor's mind then it would seem to me the question of meeting the outrageous allegations of that document are matters that should go to the presiding Judge. I therefore would suggest, if I may do so without again inviting a charge of undue zeal, that your Honor shall suspend all matters in consideration of this cause until you have examined that affidavit.

The COURT.—Well, that is the course I was about to suggest when you arose. I deem the filing of the affidavit sufficient to suspend the action of the court on the merits of any matter before it until it has had an opportunity to pass upon the sufficiency of that affidavit. When I have done so, should I conclude that it is unanswerable as tending to show bias and prejudice upon the part of this Court,

then of course the matter will be certified to the presiding Judge; if I deem that it is not of that character but such that it is not in its nature one to give rise to legal bias or prejudice—because that is what the statute deals with—then I shall certify the question to the presiding Judge to pass upon whether or not—is that the method to be followed, to the presiding Judge or to the Court?

Mr. HOW.—The Senior Circuit Judge now in the Circuit.

The COURT.—I imagine, Mr. How, that means an instance where the affidavit is found to be sufficient in substance to amount to a showing under the statute, and it would be only for the Circuit Judge a direction to some other Judge to take the matter up; isn't that right?

Mr. HOW.—The only decision that I know of is the one I read to your Honor. They speak there of its legal sufficiency but then the question whether a disqualification exists under the facts they say is not a matter for the Judge to determine.

The COURT.—I will let these pending matters stand over until say Wednesday morning and in the meantime I will advise myself as to the proper method and manner in which to answer the matters that have been set up in this affidavit.

(The further hearing of the matter was thereupon continued until Wednesday, April 5, 1916, at 10 A. M.)

Exhibit III [to Petition for Mandamus—Proceedings Had April 5, 1916, Re Motion to Disqualify, etc.].

In the District Court of the United States, for the Northern District of California, Second Division.

IN EQUITY—No. 169.

Before Hon. W. C. VAN FLEET, Judge.

THE EQUITABLE TRUST CO. OF NEW YORK

vs.

WESTERN PACIFIC RAILWAYCOMPANY et al.

Wednesday, April 5, 1916.

REPORTER'S TRANSCRIPT.

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Direct Cross Re D Re-X.

In the District Court of the United States, in and for the Northern District of California, Second Division.

IN EQUITY—No. 169.

Before Hon. WM. C. VAN FLEET, Judge.

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee,

Plaintiff,

vs.

WESTERN PACIFIC RAILWAY COMPANY
et al.,

Defendants.

Wednesday, April 5th, 1916.

Counsel Appearing:

For the Equitable Trust Co. of New York, Trustee:
JARED HOW, Esq.

For the Central Trust Co.: T. A. THACHER, Esq.

For the Boca & Loyaltan Railroad: Messrs. SLACK
& GOODRICH.

For the Savings Union Bank & Trust Company:
Messrs. PILLSBURY, MADISON & SUTRO.

For the Reorganization Committee: JOHN F.
BOWIE, Esq.

For the Receivers: JOHN S. PARTRIDGE, Esq.,
GARRETT W. McENERNEY, Esq.

Mr. McENERNEY.—In the application filed here on Monday, if your Honor please, under section 21 of the Judicial Code, your Honor has requested Mr. Partridge and me to appear here and lay before you such considerations respecting the law and facts as occur to us; as we were not able to get a copy of the affidavit until yesterday, and as I was not able to see it until this morning, we ask that the matter stand over until Friday, and as I am not able to be here in the forenoon, we ask that the hour be fixed for two P. M.

The COURT.—Have you any objection? (Addressing Mr. How.)

Mr. HOW.—I feel compelled to object to any continuation of the matter, and to urge upon your Honor's attention what I consider to be the proper and sole practice under the statute made to cover

such cases as this. I do not know what manner of presentation counsel are prepared to make or desire to make, but if it is true that the affidavit filed with your Honor is in legal form, an affidavit and sets forth the matters prescribed in section 21 of the Judicial Code, I protest that the plain and right meaning and only meaning of the statute is that your Honor is foreclosed from further proceeding with the case, and that further proceeding means not only such proceedings as are appurtenant to the relief prayed in the bill of complaint but proceeding upon this application, because this application is made in the cause and is in the proceedings in the case; and I therefore request that the Court, in obedience to the statute, will cause to be entered of record the fact the affidavit has been filed, and will cause it to be certified with the application forthwith to the Senior Circuit Judge now in this Circuit for proceedings as provided by the Judicial Code.

Mr. McENERNEY.—If your Honor please, I do not desire to enter into any discussion of this matter, first, because what I might say might be imputed to your Honor, and it would be a cruel visitation if your Honor should be held responsible for all that I think, or, indeed, for all that I say. For instance, there is a great portion of this affidavit devoted to statements of fact as to why the terms of the statute were not complied with, and I desire to ascertain whether these gentlemen can prosecute a proceeding in the Circuit Court of Appeals up to and including the 28th of March, 1916, to compel your Honor to proceed with this case, and on the 29th day

of March file an affidavit of bias and prejudice predicated upon facts, all of which existed before the 28th day of March. That is one of the things I desire to give my attention to, and will ask for the two days.

Mr. PARTRIDGE.—If your Honor please, may I suggest to your Honor that it seems to be thoroughly established by the case of *Henry v. Spear*, which is cited with approval by the United States Supreme Court in the *Steel Barrel Company* case in the 230 United States—at least, this much is established—that the Court must determine for itself whether or not the affidavit as filed is sufficient to come within the terms of section 21. Now, then, the counsel whom your Honor has requested to represent you ought, at least, to have time to advise themselves as to whether or not the affidavit does come within the terms of those two decisions; aside from everything else, it seems to me that we ought to have time to examine it in that regard. As I stated to your Honor on Monday, we were served with no copy whatsoever of this affidavit, never saw it until we came into court.

The COURT.—I do not suppose they were compelled to do that.

Mr. PARTRIDGE.—Perhaps not; at any rate, we were not able to get even a copy of it until yesterday. It is very long; and it discusses a great many matters which are involved not only in the facts, but in the law. I think we ought to have time enough to make an attempt at least to properly inform your Honor as to what the law is.

The COURT.—There is no question in my mind, from Mr. How's interpretation of the statute, that that duty rests upon the Court to determine, primarily, and before taking any action, as to the legal sufficiency of this affidavit; that the statute expressly provides; and, feeling as I do, unconscious of any bias or prejudice existing at the time this affidavit was filed, I appreciate that it being a personal assault upon the Court, upon the Judge, as to his state of mind, it is not a question which the Judge should undertake to himself determine, without legal advice. It was for that reason that I requested Mr. McEnerney and Mr. Partridge, representing me personally, to give me their judgment. Of course, eventually, I shall be called upon to determine that fact, and if I determine, either upon my own judgment or the advice of my counsel, with which my judgment may concur, that this affidavit is of legal sufficiency to give rise to prejudice such as the statute contemplates, then I shall proceed to certify the fact to the Senior Circuit Judge. If, on the other hand, I determine that it is not legally sufficient, then it is equally my duty, my imperative duty, to ignore the affidavit and refuse to enter any such record as would be required if I were called upon by reason of the character of the affidavit to certify it to the Circuit Judge. That, of course, counsel admits by his own suggestion rests upon this Court as a duty; and that is the question that I feel, inasmuch as we cannot in matters that pertain to us personally exercise the same absolutely

free and untrammelled judgment as we can with matters affecting others, that I am entitled to the advice of counsel. And while, under the circumstances, as I suggested, as a legal proposition, the attorneys for the receivers were not entitled to have a copy of this affidavit served upon them, and have had to take their own means of procuring one, I think that the request they make is but a reasonable one, and I shall grant it.

Mr. HOW.—May I say a word, your Honor?

The COURT.—Certainly.

Mr. HOW.—I do not want to be understood as making any concession that the Court has power to pass upon the sufficiency of this affidavit, excepting as to legal form.

The COURT.—You do not need to; the statute prescribes that.

Mr. HOW.—But I did not know, from what your Honor said, but what you may have misunderstood me.

The COURT.—No, I understood you perfectly; but at least that question is involved, and it casts the imperative duty upon this Court to pass upon that question, and that is the very question which I feel I am entitled to have the advice of counsel on, and with that view, the matter may go over until Friday, at two o'clock, but I trust that counsel will be ready at that time to give me such advice as will enable me to see my way clear. I have not the least disposition in the world to delay this matter. My disposition is to have it disposed of, because I think

it will readily be appreciated that the situation is not a pleasant one, nor one that anyone would have the disposition to prolong; but to the extent of enabling me to perform a duty which the statute casts upon me, I feel that the request is but a reasonable one, to enable counsel to advisedly give me such aid as may lie in their power. Let the matter go over until two o'clock on Friday.

Mr. PARTRIDGE.—Will your Honor make an order, also, that some 20 or 30 of the routine matters of the railroad that are on this morning and were postponed on account of the suspension produced by the affidavit, directing that they go over until the same time?

The COURT.—I think that those formal matters had best go over until a week from Monday. I may not be able to be here Monday, because the Sacramento term opens Monday, and I will have to be there, but I will make it a point to be here the following Monday.

Mr. PARTRIDGE.—Will your Honor then postpone all these matters until then?

The COURT.—Until Monday, the 17th.

Mr. MADISON.—Will your Honor postpone the petition for leave to intervene of the Savings Union until Friday at two o'clock?

The COURT.—That matter may go over until then. If I should conclude, within the limits of the statute, as is provided, that this affidavit is not a disqualifying affidavit, then I shall give counsel an opportunity to proceed with any matters that they

desire to submit as speedily as lies within their power and that of the Court, and they will find that there will be no disposition to delay any of these proceedings to anybody's injury.

(An adjournment was here taken until Friday, April 7, 1916, at two P. M.)

**Exhibit IV [to Petition for Mandamus—Affidavit
of William C. Van Fleet].**

*In the District Court of the United States, in and for
the Northern District of California, Second Di-
vision.*

IN EQUITY—No. 169.

THE EQUITABLE TRUST COMPANY OF NEW
YORK,

Plaintiff,

vs.

WESTERN PACIFIC RAILWAY COMPANY,
BOCA & LOYALTON RAILROAD COM-
PANY, and C. L. HOVEY, Its Receiver, and
MERCANTILE TRUST COMPANY OF
SAN FRANCISCO,

Defendants.

CENTRAL TRUST COMPANY OF NEW YORK,
Intervenor.

AFFIDAVIT OF WM. C. VAN FLEET.

United States of America,
Northern District of California,
State of California,
City and County of San Francisco,—ss.

WM. C. VAN FLEET, being first duly sworn, deposes and says:

That he is a duly appointed, acting and qualified District Judge of the United States District Court for the Northern District of California, and the Judge presiding in the above-entitled matter.

That affiant has no personal bias or prejudice of any kind or character whatsoever against The Equitable Trust Company of New York, plaintiff in the above-entitled cause, and has no personal or other bias or prejudice against The Equitable Trust Company of New York as Trustee and as plaintiff in said cause.

That affiant has no personal bias or prejudice in favor of either Frank G. Drum or Warren Olney, Jr., as Receivers of the Western Pacific Railway Company appointed in said action, or their counsel John S. Partridge.

That affiant does not know the said Equitable Trust Company of New York, nor any person connected therewith except its solicitor in this cause, and that while affiant was ill at home Mr. Alvin W. Krech, President of The Equitable Trust Company of New York, called upon affiant, and that affiant has no occasion for any bias or prejudice because affiant, as Judge of said court, has always assumed,

and still does assume, that the said Trustee does and will represent all of the First Mortgage Bondholders and not any particular class thereof and will do its full duty in the premises.

That affiant has no personal or other bias or prejudice in favor of the Savings Union Bank and Trust Company, and has never, at any time, had any business with it, or connected with the said Savings Union Bank and Trust Company, and has not even any acquaintance with any of its officers except that affiant knows in a casual and social way John S. Drum, the President thereof, and that affiant did not even know that said Savings Union Bank and Trust Company was the owner of any of the Western Pacific bonds until the 6th day of March, 1916, when petition for leave to intervene was presented by its counsel.

That in respect of the controversies mentioned in Paragraph III of the affidavit of Lyman Rhoades filed herein, affiant says that the proceeding to enjoin the plaintiff from prosecuting a certain suit by it commenced in the United States District Court for the Southern District of New York against the Denver and Rio Grande Railroad Company and others, is not being prosecuted by said Receivers and their counsel at the instance of this affiant, or being prosecuted by said Receivers and their counsel at all, in this: that the order of this court, in that regard, has been reversed by the United States Circuit Court of Appeals for the Ninth Circuit, and that in so far as said affiant is concerned, and said Re-

ceivers and their counsel, the said judgment of said United States Circuit Court of Appeals is final, and will be observed in every particular.

That in so far as the application by the Trust Company as complainant herein for a decree of foreclosure and sale of the property of the Railway Company is concerned, it is not true that said application is opposed by said Receivers and their said counsel, in this: That prior to the filing of the affidavit of bias and prejudice herein, this affiant, as Judge of said court, had determined to proceed forthwith with the hearing and trial of said cause for the purpose of entering a speedy decree of foreclosure and sale. That it was the intention of this Court on the day when said affidavit was filed, to grant the motion of said plaintiff for and set said cause for hearing for Thursday, the 6th day of April, 1916, for a hearing first, upon the question as to whether there should be an up-set price, and, second, if this court should determine that there should be an up-set price, then what the amount thereof should be, and to give all parties an opportunity to be heard in accordance with the opinion of the said Circuit Court of Appeals.

And in this behalf affiant alleges: That prior to the 6th day of March, 1916, that there had never been any application whatsoever to this court, or the Judge thereof, to set the said cause for trial, or to enter a decree therein.

That on the 6th day of March, 1916, this Court had made and entered its order directing that the Den-

ver and Rio Grande Railroad Company and the Missouri Pacific Railway Company should be made parties to this action, and had further made its order directing that thirty days' time be granted to the Receivers herein to report to this Court for action on contracts and relations with the said Denver and Rio Grande Railroad Company, and that the time limited for the said Denver and Rio Grande Railroad Company and the Missouri Pacific Railway Company to appear, and the said Receivers to report said contracts and relations, had not then expired.

That on the said 6th day of March, 1916, without any previous notice to this Court, the Solicitor for said plaintiff submitted to the Court the form of a decree, together with the stipulations mentioned in the affidavit of Lyman Rhoades.

That the said matters were presented to the Court at the opening of said court on the said 6th day of March, 1916, and it appearing that no notice thereof had been given to the Receivers, or their counsel, said Court continued the matter until 2 P. M. of said day. That at 2 P. M. of said day certain proceedings were had. That affiant refers to the stenographic report of said proceedings, and hereby incorporates the same herein.

That there has never been any opposition by the Receivers, or their counsel, to a setting of said cause or the entry of a decree therein, unless it be in the desire of said Court to have the advice of the Receivers and their counsel.

That in so far as the proceeding to bring the said

Denver and Rio Grande Railroad Company into this cause as a party defendant and to determine in said cause its liability under Contract B, is concerned, it is not true that said proceeding is being conducted by the Receivers or their counsel by the direction of this Court, or otherwise, or at all, in this: That prior to the filing of the affidavit of Lyman Rhoades herein, the said United States Circuit Court of Appeals for the Ninth Circuit had directed that a Writ of Prohibition be issued prohibiting this Court from further proceeding in the matter of its order bringing in the said Denver Company; and in this: That this Court and said Receivers and their counsel, have and do accept the said opinion of the said Honorable Circuit Court of Appeals as final in said last-mentioned matter, and neither this affiant, nor said Receivers, nor their said counsel, intend to, nor will, proceed any further therein.

That in respect of the application of the Savings Union Bank and Trust Company to be permitted to intervene in said cause in order that it may participate in the prosecution thereof, particularly of the said claim against the Denver Company, it is not true that at the time of the filing of the said affidavit there was any such application, in this: That prior to the time of the filing of the said affidavit, the said Savings Union Bank and Trust Company had withdrawn said portion of its said petition and amended the same so that its petition at the time the said affidavit was filed asked to be allowed to intervene only for the purpose of being heard upon the question of the up-set price.

And furthermore, that no petition of the Savings Union Bank and Trust Company has been granted, nor is the Savings Union Bank and Trust Company a party to the said cause.

It is not true that this affiant, as Judge of said court, identifies the Trust Company with the Reorganization Committee, and does not and never has regarded the Trust Company as in reality not acting for the bondholders who have not joined in said plan and as the representative solely of the bondholders who have joined therein, but has always assumed that said Trust Company, in accordance with its duty would at all times act impartially for the best interests of all the bondholders.

That it is absolutely untrue that in making the said statements on the 6th day of March, 1916, or any of them, this affiant clearly implied, or implied at all, that the Trustee was acting only in the interests of the bondholders who had joined in the plan of Reorganization and was not caring for all of the bondholders.

That affiant does not know what counsel for the respondents may have intimated on March 16th and 17th in the Circuit Court of Appeals, but that affiant has never intimated, nor meant to intimate, and never held any opinion that the Trustee could not be trusted to act fairly and impartially in protecting the interests of the minority bondholders as well as the interests of the majority bondholders.

That it is not true that upon the institution of the suit mentioned in said affidavit in the Southern

District of New York, this affiant, as Judge of this court, or otherwise, displayed any resentment at the Trust Company's action in commencing the same without his permission, but that on the other hand, on the hearing in open court this affiant, as Judge, stated in unequivocal terms that he had no doubt whatsoever that the said Trust Company and its counsel were acting in good faith in bringing said suit in said Southern District of New York, and that he had no feeling whatsoever in the matter arising from the fact that the District Court in California was not applied to for permission or notification given to it or affiant as such Judge. That his sole idea in enjoining said suit was his conviction, after extensive argument and investigation, that it was his duty so to do.

That affiant hereby refers to the stenographic report of all of the proceedings upon the petition of the Receivers for instructions as to whether or not said Receivers should begin suit on Contract B, and also of the proceedings upon the order to show cause, and hereby incorporated the same herein, as indicating the purpose and motive of affiant in making said order.

That it is true that counsel for the Receivers in the matter of said appeal from said order enjoining the said Trust Company maintained that said order was not an injunction within the meaning of the Judicial Code and that said counsel based their contention in that regard upon the decision of the Supreme Court of the United States in *Ex Parte Tyler*, 149 U. S. 164.

That it is not true that affiant has ever clearly or at all intimated, or was ever ready to believe, that the Trust Company instituted the said New York suit for the purpose of evading the jurisdiction of this court, or ever intimated or was ever ready to believe that the Trust Company or the majority bondholders were unwilling to confide their interests under said contract to the decision of this affiant as Judge of said court.

It is not true in any sense that this affiant, as such Judge, or otherwise, suspects or resents the conduct of the Trust Company in instituting the said New York suit, but on the contrary affiant assumes that the opinion of the Court of Appeals is correct.

That it is not true that affiant, as said Judge, or otherwise, has constituted himself a special guardian and champion of the minority bondholders, but, on the contrary, this affiant, as is his duty under the law, has at all times endeavored to act, and will continue to act for the interests of all of the bondholders and has on numerous occasions during the progress of the proceedings in open court so announced.

That it is true that the members of affiant's family had small amounts of the said Western Pacific First Mortgage Bonds but that all thereof were sold prior to the 2d day of March, 1915, when the bill to foreclose in this matter was filed in this court.

It is true that a sister-in-law of affiant had three of said bonds at the time that the said suit was commenced, but affiant has not even inquired as to

whether or not his said sister-in-law has joined the said Reorganization Committee and that by no possibility could the ownership of the said bonds by affiant's sister-in-law in any wise or manner whatsoever have any effect on the mind or judgment of affiant as Judge of said court, or otherwise, in connection with any matter involved in said action. And in this behalf, affiant alleges that during a discussion between Court and counsel on the 29th day of June, 1915, with reference to said bonds, and during the argument upon the order to show cause, affiant stated from the bench in open court, that he had once owned five of said bonds and had sold two shortly after their purchase in 1910, and had given the other three to his wife, and that his said wife had sold the same prior to the commencement of this action. That prior to the commencement of this action, affiant advised his said wife to sell the said three bonds for the reason that the same would probably go to a lower price in the market, and for the further reason that affiant expected that any action to foreclose the mortgage would be brought in the court presided over by this affiant, and affiant did not desire that any member of his immediate family should own any of said securities.

That affiant has no feeling of any kind, by virtue of the fact that said bonds were sold for less than they cost.

That in regard to the bonds owned by the sister-in-law of affiant, affiant states that he has never, in any wise, advised in regard to the same, and has

nothing whatsoever to do with the business or investments of his said sister-in-law.

And affiant further says and affirms that neither the fact that affiant or members of his family have owned any of the said bonds or the fact that his said sister-in-law owned any of said bonds at the time of the commencement of this action, or may now own the same, could or does have any effect whatsoever upon the mind of this affiant, nor has this affiant ever considered or will ever consider said ownerships in any matter connected with this cause in any manner whatsoever.

That in respect of the statement of Garret W. McEnerney in argument before the United States Circuit Court of Appeals, affiant states that he did not know of said statement of Mr. McEnerney until he had any desire whatsoever that the Denver and Rio Court, and that affiant is informed by Mr. McEnerney that the same was an expression of the personal feeling of Mr. McEnerney, and that affiant has never had read the record of the argument before this Grande Railroad Company should be forced into the hands of a Receiver, but, on the contrary, on numerous occasions during the arguments in this court affiant has stated it was not his intention or desire, if the same could possibly be avoided, to take any step which would result in a Receivership for the Denver and Rio Grande Railroad Company.

That affiant never talked with the said Garret W. McEnerney prior to the said argument in said Circuit Court of Appeals, nor consulted with him in

regard to any matter connected with said cause or any of said writs.

That affiant had no idea whatsoever as to the line of argument which would be taken by the said Garret W. McEnerney, but was satisfied to leave the management of said argument to the judgment and discretion of his attorney.

That affiant consulted with said John S. Partridge with reference to the said writs of prohibition and *mandamus* and instructed the said John S. Partridge to confine himself strictly to a discussion of the legal principles involved therein, and affiant has learned from the stenographic record upon the hearing in the United States Circuit Court of Appeals that the said John S. Partridge did confine himself strictly to the legal questions involved.

That affiant hereby refers to the stenographic record of the argument before said Circuit Court of Appeals and hereby incorporates the same in full in this affidavit.

It is true that at the time of the appointment of the Receivers, affiant was requested to appoint Warren Olney, Jr., as sole Receiver.

It is not true that it was stated to affiant that the existing Legal Department of the Western Pacific Railway Company was adequate to the discharge of the legal duties incident to this Receivership, in this: That affiant as such Judge was requested to appoint Warren Olney, Jr., sole Receiver, and it was suggested that A. R. Baldwin should act as counsel for Receiver; that at said time, said Warren Olney, Jr., was one of the attorneys for the said

Western Pacific Railway Company, defendant herein, and that the said A. R. Baldwin was also one of the attorneys for the defendant herein, and as a matter of fact the said A. R. Baldwin was attorney of record in this suit for the said defendant; that affiant, as such Judge, without intending any reflection whatsoever upon either said Warren Olney, Jr., or the said A. R. Baldwin, stated to them that it would be highly improper to take the course urged upon affiant for the reason that it has always been held, by court and text writers on Receiverships that Receivers and their counsel should be indifferent between all the parties to the action; that affiant stated that he was willing to appoint the said Warren Olney, Jr., as one of such Receivers, but deemed it proper to appoint another person to act with him; that after this it was stated to affiant that the parties had agreed upon another person to be appointed with the said Warren Olney, Jr.; whereupon, affiant stated that it was not the custom of his court to have parties to an action agree for said Court and that inasmuch as the Receivers and their counsel would be officers of and representatives of the Court in the strictest sense of usage of law and equity, and inasmuch as affiant well knew that the conduct of a transcontinental railroad would and must involve questions of magnitude, administrative, financial and legal, said Court felt justified in appointing the said Frank G. Drum as coreceiver with the said Warren Olney, Jr., and John S. Partidge as their counsel.

That affiant has no connection whatsoever with the said Frank G. Drum, but knew and knows that said Frank G. Drum is a man of the highest character and integrity, as well as of wide experience and ability in connection with large affairs, and in whose judgment and ability affiant has the utmost confidence.

That it is true that affiant was at one time the law partner of George H. Mastick, the present law partner of the said John S. Partridge, but that the copartnership existing between the said affiant and the said George H. Mastick had been dissolved on the 10th day of April, 1907, and that the said John S. Partridge formed a copartnership with the said George H. Mastick on or about the 15th day of May, 1907; that said affiant was never a partner of the said John S. Partridge at any time nor in any way connected with the said John S. Partridge in business; and affiant never had any personal acquaintance with John S. Partridge until after said copartnership.

That the sole actuating motive of affiant in designating the said John S. Partridge as counsel for said Receivers was the fact that affiant had, and now has, the most complete confidence in the integrity and ability of said John S. Partridge to conduct the legal affairs of said railroad and said Receivership, and to advise this Court with reference thereto.

That it is true that the son of affiant is employed by the said firm of Mastick & Partridge, but that affiant's said son is employed by said firm upon a small salary, and that affiant's said son has no in-

terest whatsoever in the earnings of said firm, or the business thereof, and cannot profit in any possible way by the fact that the said John S. Partridge is counsel for said Receivers, and said fact had nothing to do with the appointment of the said John S. Partridge as counsel for said Receivers, nor has said fact anything whatsoever to do with any judicial or other act of affiant in connection with said cause, nor does the said fact have any influence whatsoever upon the mind of this affiant and that affiant is informed and believes and, therefore, alleges that the said John S. Partridge ever since his appointment as counsel for the said Receivers has studiously avoided the employing of affiant's said son upon any matter even remotely connected with the said Western Pacific Railway Company or said Receivers, or any matter pending in the court of this affiant.

That in connection with the allegations in the affidavit that John S. Partridge declined to waive the issuance of citation upon the appeal and stipulate that the said appeal might be heard on the 16th day of March, 1916, affiant states that the said John S. Partridge has shown to affiant a copy of a letter sent to Jared How, solicitor for the Trust Company, in the words and figures following, to wit:

“March 8, 1916.

“Mr. Jared How,
Attorney at Law,
Mills Building,
San Francisco.

Dear Sir:

I have carefully examined and considered the stipulations proposed by you. They are (1) a paper headed ‘Appeal from Injunction and Order made February 21, 1916,’ and this stipulation reads as follows:

‘The undersigned hereby waives service upon them of the order allowing appeal and notice of appeal in the above-entitled cause, and hereby stipulates that said appeal may be heard on the 16th day of March, 1916, at the hour of 2 o’clock P. M. of said day or such other time as the Court of Appeals may direct.

‘It is further stipulated that no bond need be filed on the appeal in the above-entitled cause, but that the appeal bond be, and the same is hereby, waived.’

and (2) a paper headed ‘Appeal from Injunction and Order made February 21, 1916,’ reading as follows:

‘It is hereby stipulated and agreed by and between the appellants and appellees in the above-entitled appeal that the said appeal may be heard upon the following documents, viz.: Petition of Receivers for Time to Consider Contracts and filed May 19, 1915, a copy of which is

hereto attached, and the enumerated below copies of which are embodied in the Petition for Prohibition and are now on file in the Circuit Court of Appeals, said documents being the following:

1. Bill of Complaint.
2. Answer of Western Pacific Railway Company;
3. Order Appointing Receivers;
4. Amended Bill of Complaint;
5. Answer of Western Pacific Railway Company to amended bill of complaint;
6. Order of June 14, 1915, directing notice of hearing;
7. Dependent bill;
8. Restraining order and order to show cause;
9. Answer of Equitable Trust Company;
10. Affidavits of Krech, Cutcheon and Part-ridge;
11. Opinion of Court;
12. Injunction and Order.'

It is further stipulated that the record on appeal need not be printed, but that the documents incorporated in said petition for prohibition and attached hereto may be referred to and shall constitute the record on appeal.'

"In regard to the first stipulation, I do not see how it is possible, by any such paper, to inaugurate an appeal or to confer jurisdiction upon the Circuit Court of Appeals, and for that reason, and that reason alone, I beg to be excused from signing the same.

“In regard to the second stipulation, if you take an appeal in the manner prescribed by law, I shall certainly facilitate the establishing of the record in any manner that will fairly present the whole matter to the Court of Appeals, and it seems to me that the second stipulation presented will fairly do this. This, however, is of course subject to examination and verification and suggestions of any other papers which it may seem necessary or proper should constitute a part of the record.

Yours very sincerely,

JOHN S. PARTRIDGE,

Counsel for Receivers.”

That in respect of the order made by affiant as Judge of this court authorizing and directing the Receivers to take any steps they might deem necessary to protect the jurisdiction of the Court, affiant states that on the day that said order was made Warren Olney, Jr., one of the said Receivers, and John S. Partridge, counsel for said Receivers, called upon this affiant in his chambers and that the said Warren Olney, Jr., stated to affiant that he wanted the direct authority of this Court in the matter of any proceedings that might be taken on said appeal; that affiant thereupon stated that he did not think any such order was necessary, but that it was the duty of the Receivers to take such steps in the matter as might be necessary inasmuch as there were no other persons who could or would appear in said Circuit Court of Appeals to present therein the legal considerations in support of the action of this Court; but that affiant stated to the said Warren Olney, Jr.,

that if he felt he needed the protection of such an order, there was no objection to making the same.

That it is not true that the action of counsel for the Receivers, or counsel for this affiant as respondent to said Circuit Court of Appeals, ever had any intention, nor was it the plan or other intention of this affiant as said Judge, to prevent the expression of the judgment of the said Circuit Court of Appeals upon the questions involved in either of said writs or on appeal; nor was it the intention to proceed in said cause irrespective of the propriety or impropriety of any course which affiant had intended to adopt with reference to said matters; that as a matter of fact, said affiant had not determined upon any course whatsoever which he would adopt with reference to said matters except that affiant believed that it was proper and to the best interests of the bondholders to make the Denver and Rio Grande Railroad Company a party to this action; but that in respect to the actions of the said counsel for Receivers in moving to dismiss the said appeal, affiant is informed by said counsel, and, therefore, avers, that said counsel made said motion for the reason that counsel believed the said Receivers were necessary parties to said appeal and that if they were not parties thereto, there would be no one whatsoever to oppose a reversal of the order of this Court, inasmuch as all parties to the action then appearing in effect consented to a reversal thereof; but that since the said Circuit Court of Appeals has entered its judgment reversing the same, affiant has, as in

duty bound, accepted as the law of the case the opinion of the Honorable Circuit Court of Appeals and intends to comply strictly therewith.

That it is not true that affiant is determined to compel prosecution of claims against the Denver Company before him in this cause, or otherwise, or at all, in this: that affiant regards the opinion of the said Honorable Circuit Court of Appeals as the law of the case and does not intend, and has not intended, to proceed any further in the matter of the Denver and Rio Grande Railroad Company or of Contract B; on the contrary, as hereinabove set forth, affiant was prepared, on the very day the affidavit of disqualification was filed, to proceed and set the said cause for hearing immediately, and to proceed in strict accordance with the opinion of said Honorable Circuit Court of Appeals.

It is not true that affiant entertains a deep, or any resentment whatsoever against the Denver Company; that, on the contrary, affiant does not know the Denver Company nor any person connected therewith; and it is not true that affiant believes the banking houses mentioned in said affidavit have conspired to protect the Denver Company or the holders of any of its bonds, against the claims of the Western Pacific Railway Company bondholders. In this behalf affiant alleges that he does not know said banking companies, or any of them, nor has he any opinion whatsoever in regard to them, or any action they may have taken.

That it is not true that affiant believes that the

Reorganization Committee or the Trust Company are co-operating in any manner whatsoever with said banking companies and that it is not true that affiant believes the Trust Company intends to endeavor to secure an unduly low up-set price to be fixed by the decree herein.

It is not true that said affiant has acquired or entertains a personal or other bias or prejudice against the said Trust Company on account of the matters and things set out in said affidavit, or otherwise, or at all. That the statements in said affidavit to the effect that there was no intimation during the publication of the plan of reorganization, on the part of said Judge or said Receivers, or of counsel for said Receivers that there would be any delay in the entry of a decree of foreclosure and sale, are false and untrue in their effect in this regard; that on the 18th day of May, 1915, the said Receivers filed in this court, the said Contract B, with other contracts and asked for time in which to report the same to this court for action thereon; that subsequently, the said Receivers filed in this court their petition praying for instructions as to whether or not they should begin a suit on Contract B; that upon the argument thereof, and in the briefs filed, it was strenuously insisted by the counsel for Receivers that the Denver and Rio Grande Railroad Company must be made a party to this action and that Contract B was one of the assets of the Receivership and must be enforced prior to an entry of a decree of foreclosure and sale. That said contention was made in open

court more than six months before the plan of reorganization was adopted at all and that the proceedings on the said petition and the order to show cause issued out of this court were pending in this court at the time the said plan of reorganization was adopted.

That it is not in any sense true, as intimated in said affidavit, that the opinion of this Court rendered on the 21st day of February, 1916, had anything whatsoever to do with said plan of reorganization.

It is not true as intimated in said affidavit that affiant as Judge of said court, or said Receivers, or their counsel, has ever done anything whatsoever to prevent the carrying out of said plan of reorganization, but, on the contrary, the matters which resulted in said orders set aside and reversed by the Honorable Circuit Court of Appeals, were presented to this court long before any plan of reorganization was ever adopted; that while the matters involved in said petition and leading up to the said order and opinion of this Court were argued on the 28th, 29th and 30th days of June, 1915, elaborate briefs were filed by counsel for said Trustee and the counsel for said Receivers, and the brief of the said Trustee was not filed until the 6th day of December, 1915, and that thereafter counsel for the Denver and Rio Grande Railroad Company appearing as *amicus curiae*, filed a brief in said matter and other counsel filed reply briefs thereto, so that the matter was not finally submitted to this Court until the 31st day of December, 1915, whereupon this affiant, as Judge of

said court, proceeded to examine into the said matter as diligently as the business of said court would permit and that the decision of this court on the 21st day of February, 1915, was in response to the said matter before this court and had no connection in any manner whatsoever with any attempt of any person to interfere in any way with the said plan of reorganization; that this affiant has never had any feeling of opposition whatsoever against said plan of reorganization nor any opinion regarding the same one way or another, and in that regard affiant states that he has never even read said plan, and does not know what said plan is, and has not formed any opinion thereon.

That it is not true that affiant, as such Judge, intended by the proceedings on the 6th day of March, 1916, to prevent any review of the Honorable Circuit Court of Appeals concerning the right of the parties to the entry of the decree, but that as a matter of fact on the said 6th day of March, 1916, affiant, as such Judge, postponed the hearing for the reason that a petition for the writ of prohibition had been filed, and for the reason that affiant as such Judge did not deem it proper to either grant or deny the applications without consideration, and for the further reason that affiant did not deem it proper practice to entertain an application, the avowed purpose of which was to have the same denied.

That with respect to the intimation that this affiant, as such Judge, rendered his decision of February 21st, 1915, and refused to permit the entry of said decree in the full belief that his action would

probably defeat the carrying out of said plan of reorganization, and with the desire that such might be the result, affiant states that the same is false and untrue in every particular, and affiant further states that he is not personally or at all opposed to said plan of reorganization, but the statement that he is is false and untrue in every particular, and that it is untrue that affiant is determined to defeat the same.

That it is untrue that affiant has a personal or other prejudice against the Trust Company, by reason of its co-operation with the Reorganization Committee in the endeavor to carry out said plan of reorganization, or for any other reason.

That in respect of the allegations that no general order was entered limiting the order confirming contracts to the period of receivership, affiant states that it is the opinion of affiant that there was never any occasion for such an order, but that the effect of such confirmation would only extend during the period of such receivership unless otherwise specifically stated.

That the only lease upon which there was any serious dispute was the lease of property to Dunham, Carrigan & Hayden Company upon which briefs were filed, and that as to said matter the solicitor for the plaintiff finally withdrew his opposition.

That affiant hereby refers to the stenographic report of all hearings upon all matters whatsoever in connection with the above-entitled action and said receivership, and hereby specifically makes the said stenographic record a part hereof.

That it is true that solicitor for the plaintiff

called upon affiant, in his chambers, with reference to a modification of the restraining order so as to permit the action in New York to go on against individual bondholders, but in that behalf affiant states that the said John S. Partridge, at said time, reported to affiant that only three suits for small amounts had been brought by individual bondholders and that there was no danger whatsoever of the results feared by the plaintiff, and that, as a matter of fact, no additional suits have ever been brought, although a period of ten months has elapsed and the suits which were commenced have never been brought to trial, so that the fears of the plaintiff in said regard have been proved to be entirely groundless.

Affiant further states that it is untrue that, by reason of the matters or things set forth in said affidavit and reiterated in paragraph fifteen thereof, or otherwise, or at all, he had any personal bias or prejudice in favor of said Receivers or their said counsel, or against the said Trust Company.

That it is untrue that, by reason of the matters and things set forth in paragraph sixteen of the affidavit of disqualification or otherwise, affiant has any personal or other bias or prejudice in favor of the said Savings Union Bank and Trust Company, but that, on the other hand, affiant has no feelings whatsoever in regard to said Savings Union Bank and Trust Company or John S. Drum, the president thereof, but as heretofore stated, never knew until March 6th, 1916, that said Savings Union Bank and

Trust Company had any interest in this matter; that affiant has not, will not, and cannot be in any wise whatsoever influenced by the fact that the said John S. Drum is a brother of Frank G. Drum and that neither said Savings Union Bank and Trust Company, nor said John S. Drum, is a party to this action, nor has yet been permitted to intervene herein.

Affiant, further states and avers, upon his oath that he has no feelings of bias or prejudice for or against any person party to the above-entitled cause, or for or against any bondholder creditor, stockholder, officer, agent or any other person who is or can be directly or indirectly interested in the above-entitled cause, or any subject matter or thing connected therewith.

That it is the intent of the affiant to proceed forthwith and with all possible expedition to the hearing of any further matters which may be involved in said cause, looking to the speedy entry of a decree of foreclosure and sale and winding up of the receivership.

That affiant is satisfied, in the state of his own mind that affiant in all matters and things in connection with said action can and will, and intends to do equal and exact justice to all parties who may be interested therein.

That under the decision of the Honorable Circuit Court of Appeals and the stipulations on file herein, there is no controversy left in said cause to which the said Equitable Trust Company of New York is

a party, in this: That the only question left in this cause over which there can be any controversy is the question of the up-set price, and that the said Trustee is not a party to, nor in anywise interested therein.

That on the 6th day of March, 1916, in open court, the solicitor for the said Trustee said:

“I also ought to call your attention to the fact that there is a blank in the form of decree presented to the Court, or, rather, suggested to the Court, and covered by the motion which has been made, for the fixing of an up-set price. In that regard I do not think that I ought to refrain from saying that my conception of the duty of the Trustee is to take absolutely no part as to the up-set price which this Court may see fit to set, excepting that it holds itself liable to furnish the Court such information as it may for the aid of the Court. The only suggestion that I think the Trustee is entitled to make with any propriety is that the upset price shall not be put at such figure as will make a sale impossible, as will not produce a bidder. What that figure is, I do not know.”

Subscribed and sworn to before me this — day
of

**Exhibit V [to Petition for Mandamus—Affidavit of
John S. Partridge].**

*In the District Court of the United States, in and for
the Northern District of California, Second Di-
vision.*

IN EQUITY—No. 169.

THE EQUITABLE TRUST COMPANY OF NEW
YORK,

Plaintiff,

vs.

WESTERN PACIFIC RAILWAY COMPANY,
BOCA & LOYALTON RAILROAD COM-
PANY, and C. L. HOVEY, Its Receiver, and
MERCANTILE TRUST COMPANY OF
SAN FRANCISCO,

Defendants,

CENTRAL TRUST COMPANY OF NEW YORK,

Intervenor.

United States of America,

State of California,

Northern District of California,

City and County of San Francisco,—ss.

John S. Partridge, being first duly sworn, deposes
and says:

That he is the John S. Partridge mentioned in the
affidavit of Lyman Rhoades on file herein; that imme-
diately upon the appointment of the Receivers, on
the 3d day of March, 1915, affiant as counsel for the

said Receivers, started in an investigation of the relation between the Denver and Rio Grande Railroad Company and the Western Pacific Railway Company, and also, an investigation of the law bearing thereon; that affiant became convinced from said investigation that the contract known as "Contract B" was a part of the mortgaged property and inasmuch as the same contained specific provisions, which provisions were repeated in the Deed of Trust, that the Western Pacific Railway Company should bring all necessary action at law and in equity for the enforcement of the same (although the same likewise provided that such action could be brought by the Trustee), affiant became convinced that there was at least legal reason for believing the same should be enforced by the Receivers;

That all of the actions of affiant in regard to said Contract "B" were based upon this belief and upon nothing else whatsoever; that all of the actions taken by affiant as counsel for such Receivers have been with the desire to have the said legal question determined in the due and regular process of law and no one of said actions has ever been actuated by any motive whatsoever in favor of or against any person or persons whatsoever; that as soon as the Honorable Circuit Court of Appeals had decided otherwise, this affiant immediately accepted the said opinion of said Court of Appeals as final and conclusive upon that question and so advised the said Receivers and that neither said Receivers nor affiant have intended since the opinion of said Court of

Appeals was rendered, to take any further steps whatsoever in regard thereto, nor do they now so intend;

That no act whatsoever of this affiant or of said Receivers in bringing before said Court and in urging the enforcement of said contract, or the bringing in of the Denver and Rio Grande Railroad as a party, has ever been actuated in any way, by any feeling of opposition whatever against the Reorganization Committee or the Trustee, or any other persons connected with, or intercepted in said suit, but solely by the legal belief that the same was their legal duty;

That when affiant was requested by the Judge of this court to act as counsel for said Receivers, said Judge stated to said affiant that he desired the affiant to prepare himself and present to the Court, all legal questions involved and those alone, and that affiant, to the best of his ability and belief, has done this and this alone;

That Alan C. Van Fleet is employed in the office of the law firm of which affiant is a member; that said law firm is a partnership consisting of George H. Mastick and the said affiant; that no other person is a member of said firm and that the said Alan C. Van Fleet is not and never has been a member of said firm and has no interest whatsoever in the earnings of said firm; that the said Alan C. Van Fleet was employed by said firm immediately upon his graduation from college and on account of his character and ability, and for no other reason, and ever since has been so employed;

That affiant believes as a matter of law, and has advised the Receivers herein, that said Receivers have no interest whatsoever in the question of the up-set price and that neither said Receivers nor said affiant intend to take any part whatsoever in any proceedings with regard to an up-set price unless they may be called upon as witnesses to supply any data in their possession;

That affiant believes as a matter of law, and has advised said Receivers that since the opinion of the Honorable Circuit Court of Appeals, there is no matter left to be controverted in which said Receivers are in any wise interested, excepting only the controversy with the Southern Pacific Company arising from their complaint in intervention with regard to their claims for switching charges;

That neither said Receivers nor affiant have in any way attempted, nor desire in any manner or form whatsoever, to delay the entry of a decree herein, unless their action in presenting to said Court, the question regarding the Denver and Rio Grande can be so construed; that since this said last matter has been disposed of by the said Honorable Circuit Court of Appeals, the said Receivers and their said counsel intend to and will facilitate by any means at their disposal, a speedy entry of a decree for sale of said property and termination of the said receivership.

Subscribed and sworn to before me this —— day
of April, 1916.

Notary Public, in and for the City and County of
San Francisco, State of California.

[Endorsed]: Marshal's Docket No. 7706. No. 2781.
United States Circuit Court of Appeals for the
Ninth Circuit. In the Matter of the Petition of the
Equitable Trust Company of New York, as Trustee,
for a Writ of *Mandamus*, etc. Order to Show Cause
and Restraining Order, With U. S. Marshal's Re-
turn on Service of Writ. Filed Apr. 18, 1916. F. D.
Monekton, Clerk U. S. Circuit Court of Appeals for
the Ninth Circuit.

[Order to Show Cause and Restraining Order.]

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

In the Matter of the Petition of the **EQUITABLE
TRUST COMPANY OF NEW YORK**, as
Trustee, for a Writ of *Mandamus*, to be Issued
and Directed to the Honorable **WILLIAM C.
VAN FLEET**, Judge of The United States
District Court, for the Northern District of
California, Second Division.

The petition of the Equitable Trust Company of
New York, as Trustee, praying for a Writ of *Man-
damus* to be issued and directed to the Honorable
William C. Van Fleet, Judge of the United States
District Court, for the Northern District of Califor-

nia, Second Division, having been presented to the senior Circuit Judge of the United States Circuit Court of Appeals, for the Ninth Circuit;

It is hereby ordered that the same may be filed, and that the said Honorable William C. Van Fleet be, and he is hereby directed to appear before the United States Circuit Court of Appeals, for the Ninth Circuit, at the courtroom of said court in San Francisco, California, on the sixth day of May, 1916, at the hour of 10:30 o'clock A. M. on said day, to show cause, if any, why said petition should not be granted, and why the writ as therein prayed should not be issued.

And it is further ordered that pending the hearing and disposition of this order to show cause, the said Honorable William C. Van Fleet be, and he is hereby restrained and enjoined from taking any steps or proceedings in that certain action pending in the United States District Court, for the Northern District of California, Second Division, and entitled "Equitable Trust Company of New York, Trustee, versus the Western Pacific Railway Company et al."

Dated April 17, 1916.

WM. B. GILBERT,
Circuit Judge.

ERSKINE M. ROSS,
Circuit Judge.

WM. H. HUNT,
Circuit Judge.

[Endorsed]: No. 2781. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Petition of the Equitable Trust Company of New York, as Trustee, for a Writ of *Man-damus*, to be Issued and Directed to the Honorable William C. Van Fleet, Judge of the United States District Court, for the Northern District of California, Second Division. Petition for Writ of *Man-damus*.

Filed April 17, 1916.

F. D. MONCKTON,
Clerk.

[U. S. Marshal's Return on Service of Writ.]

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed Order to Show Cause and Restraining Order on the therein named Honorable WILLIAM C. VAN FLEET, Judge of the United States District Court for the Northern District of California, Second Division, by handing to and leaving a certified copy thereof with said Honorable William C. Van Fleet, Judge of the United States District Court for the Northern Dist. of Cal., personally, at San Francisco, in said District, on the 18th day of April, A. D. 1916.

J. B. HOLOHAN,
U. S. Marshal.

By Geo. H. Burnham,
Chief Office Deputy.

At a stated term, to wit, the October Term, A. D. 1915, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the third day of May, in the year of our Lord one thousand, nine hundred and sixteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge, Honorable WILLIAM H. HUNT, Circuit Judge.

No. 2781.

In the Matter of the Petition of THE EQUITABLE TRUST COMPANY of New York, as Trustee, for Writ of Mandamus to be Issued and Directed by the Honorable WILLIAM C. VAN FLEET, Judge of the United States District Court for the Northern District of California, Second Division.

Order Granting Application to Amend Petition for Writ of Mandamus, etc.

Upon consideration of the Application to Amend Petition this day filed, for leave to amend the Petition for Writ of Mandamus filed in the above-entitled matter on the 17th day of April, A. D. 1916, and upon the oral motion of Mr. Jared How, counsel for the petitioner, and good cause therefor appearing, it is ORDERED that the said Petition for Writ of Mandamus be amended in accordance with said

Application for leave to amend, and that the said Application be printed and made a part of said Petition for Writ of Mandamus.

United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of the Petition of THE EQUITABLE TRUST COMPANY of New York, as Trustee, for Writ of Mandamus to be Issued and Directed to the Honorable WILLIAM C. VAN FLEET, Judge of the United States District Court, for the Northern District of California, Second Division.

Application to Amend Petition [for Writ of Mandamus].

The petitioner above named prays leave to amend the petition herein by inserting therein before the paragraph beginning with the third line from the bottom of page 15 thereof in the printed record, the following paragraph, that is to say:

“Upon the conclusion of such argument of Garrett McEnerney, hereinabove referred to, and upon the 8th day of April, 1916, to which day the hearing upon the matter of such affidavit and application had been adjourned and upon which day the arguments thereon had been continued, said judge Honorable William C. Van Fleet gave orally the following opinion and decision in the matter of such affidavit and application.

‘The COURT.—I presume it is hardly necessary for me to suggest that the situation presented to the

Court is not a pleasant one; I do not suppose there is anybody within the sound of my voice who will not appreciate that that necessarily must be the fact. Resting under such a charge as has been made here places the Judge occupying the bench in a painful and embarrassing situation and makes his duty hard; but I trust that there is not lurking in the mind of anyone before the Court the idea that by reason of the unpleasant character of a duty coming before the Court it is disposed to shrink from the performance of that duty. It is not necessary to go into any recital of the facts which have been developed by the affidavits filed here on the one part and denied on the other. I thought and I now think that as to the facts set forth in this co-called disqualifying affidavit the Court was entitled to have the independent judgment of others in whom it had confidence to put an interpretation upon those facts for the purpose of laying before the Court their judgment as to whether or no they were of a character which in their nature tended to make such a case as the statute under which this affidavit was filed has in contemplation. I had my own ideas about it—I usually have; but, as I say, I wanted the aid of those whose minds were not affected by the circumscribing effect of the fact that I personally was the subject matter of those charges. We all appreciate, as I suggested the other day, that we are not the best judges in matters that pertain most strictly and vitally to ourselves. Men very frequently fail in reaching the best judgment where they attempt to decide matters of that kind for themselves. But

I was satisfied, and nothing that has been here suggested has to any extent shaken my conviction as to that, that the statute by its very terms contemplates and makes it the duty of the Court to pass not only upon the formal sufficiency of an affidavit of this kind, but the facts relied on as tending to disclose that state of mind which the law fixes as the disqualifying thing that shall require the abdication of jurisdiction otherwise vested in the Judge. That the Court is called upon to determine the sufficiency of those facts I would have been ready to hold, independently of any authorities that have been referred to here, because from the very language of the section, it seems to me that such is the necessary implication from its words. The Court must pass upon the legal sufficiency of this affidavit in order to determine the course it will pursue.

‘What does the term “legal sufficiency” mean? It does not mean that because one may arrange a set of words to conform to the framework indicated in the statute the Court must stop and say that *ipso facto* upon the filing of such a paper it is ousted of its jurisdiction. The term “legal sufficiency” means that the affidavit shall in the substantive matter set forth as showing a case of personal bias or prejudice, be of a nature which the Court can say has that tendency; and it must also determine whether or not the statute has been complied with in its other essential feature, the filing of the affidavit within the time called for by the statute.

‘I am perfectly satisfied that in every essential

aspect that has been discussed here by counsel this affidavit is not such as may be regarded under the statute as ousting this Court of jurisdiction in this case. First, that the essential facts set forth therein and relied upon as constituting the substance of the disqualifying situation do not in their legal effect tend to show any personal bias or prejudice on the part of the Court toward any party to this controversy. In the next place, I am entirely satisfied that in the attempt to show excusatory reasons for the failure to comply with the requirements of the statute to file this affidavit within the time fixed therein the facts are entirely insufficient not only to affirmatively show any excuse, but moreover the affidavit affirmatively shows that the essential facts relied upon here which would tend in any sense to create a personal bias or prejudice in the mind of this Court have been known to the parties and all of the parties to this controversy since very early in the year 1915 and soon after the action was filed in this court. Therefore when it is undertaken to allege in this affidavit reasons for not complying with the statute in filing it within time the party presenting this affidavit has been confronted with facts disclosed upon the record in this court and in the proceedings therefor had, which entirely refute those statements in the affidavit.

‘Now, is the Court to be called upon to abdicate its jurisdiction because of the filing of a paper of that kind? It has been very aptly said here, and it has been repeatedly held, that it is as much the duty of a Judge to continue in the exercise of a jurisdic-

tion which is his, if he be not disqualified, as it is to surrender that jurisdiction if the facts are such as to bring about a disqualification.

‘But I will go farther than that and say that if I felt the least sense of my inability to pass upon the rights of every party involved in this controversy and give them the due meed of justice to which they are entitled, I would ignore every consideration of technical sufficiency and would certify this affidavit to the Senior Circuit Judge with the request that someone else have the burden cast upon them of carrying out what is left before this Court of the controversy in question. But I cannot conscientiously say that I have the least question of my ability to do equal and fair and unbiased justice between those parties. Having that feeling, it is my duty to refuse to make such a certificate, and therefore I shall refuse it.

‘I don’t propose to enter upon questions that have been discussed here as to the good or bad faith of this thing. I want in that regard to say that I do not believe I am the only individual here who has had unpleasant duty to perform. I think I know the character of counsel for the plaintiff in this case sufficiently well—that is, that I have not so misjudged him as to be justified in thinking that this action, which has resulted in an attempt to disqualify the judge of this court, ever had its inception in his mind, or ever had his personal approval. And when I say that I have not been alone the one with unpleasant duties cast upon them I have reference to the fact that counsel found himself

placed in a position where, by reason of his relation to his clients and their determination that such a proceeding should be taken, it was necessary for him, in order to conform in that respect with the statute, that counsel should give his certificate that the affidavit was filed in good faith. I believe that if the real sentiments of counsel could be looked into, it would be found that that was an act very reluctantly performed on his part. So, as to that, I have no feeling of resentment in the matter whatever, nor do I resent in any judicial way the construction they have put upon the manner in which this Court has administered this trust that has been committed to it, and growing out of which they have seen fit to deduce prejudice. That is their privilege. The books are bristling with scores of cases where the same thing has been done. If they felt that they were justified in taking the course they have, then that is a matter which rests with them. It excites no resentment in my mind. Of course, I would be less than human were I to say that the character of the charges here made were such as are entirely agreeable to one's mind; I dislike it, however, more in behalf of the tribunal I represent than for my own personal feelings. If I felt that my character was such in this community that I could not safely leave it to the public to say whether the matters charged in this affidavit of a personal character would be calculated to affect my judgment, I would be very sorry to think that I have lived in this community for the length of time I have and administered justice from this bench and others

for the period that I have and yet have a feeling in the community that I would be subject to such influences as are intimated here—not charged.

‘The affidavit does not say that I will be affected by the sordid motives which one might deduce from the matters charged in it, and I don’t know exactly the purpose of putting such matters in the affidavit, unless it is to leave that sinister meaning to inference.

‘But, summing up the whole affidavit in its entirety, I am quite satisfied, as I have said, that it wholly fails to make a case under the statute which would tend to show the existence in the mind of this Court of a state of personal bias or prejudice against any party connected with this case. I do not care whether technically the Equitable Trust Company is really a party to the controversy still remaining here, or not. It is argued that it is not; but it is a formal party, and I am not prepared to say that legally it did not have a right to interpose an affidavit of this kind. I care nothing about those things. I am looking only at the merits of the matter.

‘I shall ask counsel to prepare an order in line with the suggestions that I have made, denying the application to certify this so-called disqualifying affidavit to the Senior Circuit Judge of this circuit.

‘I want to say to counsel at this time that I am quite ready to proceed immediately and at as early a date as counsel may deem compatible with the situation to dispose of the matters remaining before this Court for disposition, to the end that this prop-

erty may be taken out of the hands of the receivers and turned over to those who may become the purchasers thereof. I shall not, however, set it down for a definite date unless counsel ask me, because it may well be that counsel for the complainant will feel that it is his duty to seek and to have determined the question of whether 'or not my action in refusing to certify this affidavit is correct. If they are so advised I will give them plenty of time to have it done. On the other hand, however, if it is the desire of counsel to have an early date set for the disposition of matters before this Court, I will listen to any such suggestion. And I may say to counsel that, if he desires to make any such suggestion, reserving his right to object hereafter to what is done by this Court, he may have that right reserved.' "

MURRAY, PRENTICE & HOWLAND,

JARED HOW,

Counsel for Petitioner.

State of California,

City and County of San Francisco,—ss.

I have read the amendment incorporated in the foregoing application for leave to include the same in the petition herein. The facts stated in such amendment are true.

JARED HOW.

Subscribed and sworn to before me this 3d day of May, A. D. 1916.

[Seal]

FLORA HALL,

Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: No. 2781. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Petition of The Equitable Trust Company of New York, as Trustee, for a Writ of Mandamus, to be Issued and Directed to the Honorable William C. Van Fleet, Judge of the United States District Court, for the Northern District of California, Second Division. Application to Amend Petition. Filed May 3, 1916. F. D. Monckton, Clerk.



No. _____

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

IN THE MATTER OF THE PETITION OF
THE EQUITABLE TRUST COMPANY OF
NEW YORK, AS TRUSTEE, FOR A WRIT
OF MANDAMUS, TO BE ISSUED AND
DIRECTED TO THE HONORABLE WIL-
LIAM C. VAN FLEET, JUDGE OF THE
UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALI-
FORNIA, SECOND DIVISION.

BRIEF IN REPLY.

MURRAY, PRENTICE & HOWLAND,
JARED HOW,
W. E. S. GRISWOLD,
Attorneys for Equitable Trust Company
New York.

BYRNE & CUTCHEON,
CHARLES S. WHEELER,
and
JOHN F. BOWIE,
Amici Curiae.

Filed this _____ day of May, 1916.

_____, Clerk.

By _____ Deputy Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

IN THE MATTER OF THE PETITION OF THE
EQUITABLE TRUST COMPANY OF NEW
YORK, AS TRUSTEE, FOR A WRIT OF MAN-
DAMUS, TO BE ISSUED AND DIRECTED TO
THE HONORABLE WILLIAM C. VAN FLEET,
JUDGE OF THE UNITED STATES DISTRICT
COURT, FOR THE NORTHERN DISTRICT
OF CALIFORNIA, SECOND DIVISION.

BRIEF IN REPLY.

The cases principally relied upon to support the argument that Section 21 of the Judicial Code should be construed to place in the district judge the power of determining whether the affidavit of prejudice is sufficient do not deal with statutes like the one in question. For example, the statute under consideration by the Supreme Court of Kansas in the case (*State v. Bohan*, 19 Kan., 54) cited in the opinion of Judge Jones in *Ex Parte Fairbank Company*, 194 Fed., 978, at page 27 of respondent's printed brief, dealt with a statute which provided that it should be made to appear *to the satisfaction of the Court* by affidavit that the prejudice existed.

The California decisions so heavily relied upon

dealt with Section 170 of the Code of Civil Procedure which provides that "When it appears from
 " the *affidavit* or *affidavits* on file that either party can-
 " not have a fair and impartial trial before any judge
 " of a court of record about to try the case by reason
 " of the prejudice or bias of such judge, said judge
 " shall forthwith secure the services of some other
 " judge of the same or another county to preside at
 " the trial of said action or proceeding . . . pro-
 " vided counter affidavits may be filed . . ."

In *People v. Compton*, 123 Cal., at page 413, the court says:

"As to justices of the peace a somewhat similar provision has long been upon our books. . . . The place of trial, where the action is commenced in a justice's court, must be changed when either party makes and files an affidavit that he believes that he cannot have a fair and impartial trial before such justice, by reason of the interest, prejudice, or bias of the justice. Under this law it has always been held that the filing of an affidavit in conformity with its provisions makes it the duty of the judge to transfer the cause (*People ex rel. Flagley v. Hubbard*, 22 Cal., 34). It seems to have been contemplated by the legislature in framing the statute applicable to the justice's court that the justice shall be relieved from the very delicate and trying duty of deciding upon the question of his own disqualification, and that the mere fact that a suitor in his court makes affidavit of his belief that the justice is biased against him renders it imperative upon the justice to transfer the cause to some other disinterested officer. We should unhesitatingly say that this same salutary rule was in the mind of the legislature when it amended Section 170 of the Code of Civil Procedure by providing that the litigant shall have a new judge or a transfer of his

cause 'when it appears from the affidavit or affidavits on file that either party cannot have a fair and impartial trial by reason of the bias or prejudice of the judge.' But the succeeding portion of the amendment seems to militate against this view, for it is therein provided that counter-affidavits may be filed."

The argument of respondents also appears to fail to get the true meaning of the American Steel Barrel Company case. In that case the court says: "If Judge Chatfield had ruled that the affidavit had not been filed in time or that it did not *otherwise* conform to the requirement of the statute, and had proceeded with the case, his action might have been excepted to and assigned as error when the case finally came under the reviewing power of an appellate tribunal." And for this decision the court cited *Henry v. Speer*, 201 Fed., 869, *Ex Parte M. K. Fairbank Company*, 194 Fed., 978, and *Ex Parte Glasgow*, 195 Fed., 780.

It should be observed that the court did not include in its statement the situation that is presented in this case. It did not say that if Judge Chatfield had exercised jurisdiction to determine whether, although the affidavit was not filed in time, good cause had been shown why it had not been filed in time, such action could have been excepted to and assigned as error. There can be no doubt that if the affidavit had not been sufficient upon its face, that is to say, if it had not alleged personal bias or prejudice and if it had not been filed in time and no attempt had been made

to show good cause why it had not, the affidavit would not have been entitled to be filed at all and there would have been nothing for the practice provided by the statute to work upon.

The cases cited by the court are consistent with this view. In *Henry v. Speer*, the affidavit in question did not allege *personal* bias, and therefore was not sufficient under the statute. The Court of Appeals held that the judge had the duty to determine whether the affidavit was the affidavit specified in the statute and whether it was legally sufficient, and there can be no doubt that this decision in the premises was sound.

The affidavit in question in *Ex Parte Fairbank Company* did not state or attempt to state the facts and reasons for the belief that the prejudice existed, and therefore was not sufficient under the statute.

The affidavit in question in *Ex Parte Glasgow* was filed after the case had been heard and a verdict rendered, and it is apparent that this was not in time under the statute which provides that the affidavit must be "that the judge before whom the *action or proceeding is to be tried or heard* has a personal bias or prejudice" and so forth.

With regard to the position which respondents take in their brief that mandamus will not lie and to the decisions which they cite in support of that position, it should be observed that they were all cases in which mandamus or habeas corpus, as the case might be, were attempted to be used in lieu of a writ of error or

appeal. In the Steel Barrel Company case, for example, mandamus was sought against Circuit Judge Lacombe, District Judge Chatfield and District Judge Mayer. The court held that mandamus would not lie against Circuit Judge Lacombe to review the determination made by him with complete jurisdiction to make it. It is obvious that it could not lie against Judge Mayer, who was acting under the designation made by Judge Lacombe through an order unreversed and in full force; and it is apparent that for the same reason it could not lie against Judge Chatfield.

The distinction between the American Steel Barrel Company case and this case is that mandamus is not sought here to reverse or displace an order made with full jurisdiction to make it. It is sought merely to compel an action purely ministerial.

If the Court should arrive at the conclusion that the statute is to be interpreted as giving to the Judge, whose qualification is in question, power to determine whether or not the excuse offered for failure to file the affidavit ten days prior to the commencement of the term be sufficient, nevertheless, the petitioner is entitled to the relief prayed for.

The respondent contends that even though the determination that the affidavit was not filed in time be clearly and palpably erroneous, nevertheless the petitioner is not entitled to the writ, for it is asserted that mandamus will not issue to compel the perform-

ance of the ministerial duty of certifying the affidavit.

This claim is wholly predicated upon the theory that the performance of a ministerial duty cannot be enforced by mandamus, if the person against whom the mandamus is sought be a judicial officer, and his refusal to perform the ministerial duty shall have been preceded by a palpable abuse of discretion concerning the matter in relation to which discretion is by law vested in him. Such, however, is not the law.

In *Virginia v. Rives*, 100 U. S., 313 to 323, it is declared that *mandamus does not lie to control judicial discretion, except when that discretion has been abused.*

In *Ex parte Harding*, 219 U. S., 363, after reviewing various cases on this subject, the Supreme Court of the United States, referring to the apparent conflict between cases such as *Virginia v. Rives*, *Virginia v. Paul*, and *Kentucky v. Powers*, on the one hand, and *Ex parte Hoard* and *Ex parte Gruetter*, on the other hand, said:

“Bearing these matters in mind it plainly results that the conflict presented has arisen, not because of the announcement in any of the cases of any mistaken doctrine as to jurisdiction, or of any wrongful decision of any of the cases on the merits, but has simply been occasioned, beginning with *Ex parte Wisner*, from applying the exceptional rule announced in *Virginia v. Rives* to cases not governed by such exceptional rule but which fell under the general principle laid down in *Ex parte Hoard* and the line of cases which have followed it.”

It has been repeatedly decided by the Supreme

Court of the United States that a gross abuse of judicial discretion can be corrected on mandamus, even though an appeal be possible, if the remedy by appeal be totally inadequate, or the exceptional circumstances of the case justify interposition in this manner.

See

Virginia v. Rives, 100 U. S., 313;

Virginia v. Paul, 148 U. S., 107;

Kentucky v. Powers, 201 U. S., 1.

This is the recognized rule.

"An exception to the general rule that discretionary acts will not be reviewed or controlled exists when the discretion has been abused, for example, mandamus may in a case be granted where the action has been arbitrary or capricious or from personal or selfish motives."

Cyc., Vol. 26, 161, 162, and cases cited.

"Likewise, it has been held that mandamus may issue where discretion has been exercised on questions not properly within it, *or where the action is based upon reasons outside the discretion imposed.*"

Cyc., Vol. 26, 162.

Where a case is one in which mandamus may properly issue, the fact that a remedy by appeal exists is not determinative of the right to mandamus, but vests in the court to which the application for mandate is made discretionary power either to grant or deny the writ. If the remedy by appeal be adequate

the writ will be denied. If the remedy by appeal be inadequate, the writ will be granted.

In *In re Dennett*, 215 Fed., 673, this Court has held that where the remedy by appeal was not equal to or comparable to that afforded by the writ of mandamus, the mere fact that an appeal was possible did not afford ground for denying the issuance of the writ.

In *Ex parte Metropolitan Water Co.*, 220 U. S., 539, the United States Supreme Court reviewed in a proceeding for mandamus the failure of a District Judge to call in judges to sit with him in a case in which the refusal was based on a misinterpretation of the statute.

In *Barber Asphalt Paving Company v. Morris*, 132 Fed., 954, and in *McClellan v. Carland*, 217 U. S., 268, a writ of mandamus was issued to compel a court to set a case for trial, even though that court had, in the exercise of its discretion, ruled that the case should not, under the existing conditions, be set for trial.

In these cases there was no doubt as to the discretion or power of the trial court to fix the time for the trial of the cause, but the discretion had in each instance been abused, and this abuse of discretion was corrected by mandamus.

We respectfully submit that the performance of a ministerial duty can be compelled by mandamus, even though the refusal to perform that duty be based upon an exercise of discretion. In such cases, how-

ever, the writ can only issue when there has been a plain abuse of discretion. Or, when in exercising the discretion confided, the officer or tribunal has acted upon reasons outside of the discretion imposed.

Of course, in this case there can be no claim that an adequate, or indeed any remedy is possible by appeal from the final decree.

The refusal of Judge Van Fleet to transmit to the Senior Circuit Judge the affidavit filed in this cause was not only a clear abuse of discretion, but was admittedly based on reasons outside of the discretion imposed.

The term of court commenced on the 6th day of March, 1916. At this time no controversy had arisen in the cause, except such as existed between the receivers and their counsel and the Equitable Trust Company, and the controversy then existing in this Court between the Judge of the trial court and the Equitable Trust Company. On this day, and with the cause in this condition, the Equitable Trust Company, acting under advice of its counsel, applied to the Court for a consent decree, the stipulation for the entry of the decree being signed by all parties to the cause. This stipulation was presented to the Court on the morning of March 6, 1916, and the Equitable Trust Company had been advised by counsel that the Court would and could be compelled to grant, and could not refuse to grant, the relief prayed for. The

Court, however, declined to act one way or the other upon the motion; adjourned the hearing thereon until two o'clock of the afternoon of that day, and at this time the Savings Union Bank & Trust Company, of which John S. Drum is president, said John S. Drum being the younger brother of Frank G. Drum, one of the receivers, appeared in the cause and asked leave to intervene, to call witnesses, and become a party, in order that an up-set price of upwards of \$40,000,000 might be placed upon the property.

The lower Court never acted upon either the motion to intervene, or on the petition to enter a decree, all subsequent proceedings having been taken in this Court, except those connected with the filing of the affidavit. These proceedings, as they are doubtless within the recollection of this Court, will not be recapitulated.

However, on the 8th day of March, 1916, counsel for the Equitable Trust Company, desiring to have presented to this Court an appeal from an order made by the Judge of the lower Court on his own motion, and not desiring to have any question concerning the necessary parties to this appeal arise, applied to the receivers and requested them to stipulate to the record, and to waive citation. Counsel for the receivers at this time wrote a letter implying that the receivers would stipulate. This letter is set forth in Judge Van Fleet's affidavit. Within less than twelve hours thereafter counsel for the receivers in-

formed counsel for the Equitable Trust Company that he would not stipulate to the hearing of the appeal.

The questions presented by the appeal were different in form, though similar in substance, to the questions presented on the petition for prohibition, that is, the same questions of law underlaid both cases, but many technical objections might have been urged to the proceeding on prohibition which could not possibly have been urged to the proceeding on appeal. If the right to move to dismiss the appeal had not been asserted, there could have been no objection to the Court of Appeals considering on the merits all questions presented. However, counsel for the receivers refused to sign this stipulation, and their refusal so to do was approved by the Judge of the lower Court.

The only conceivable object for this conduct is that of an intent to prevent, if possible, consideration on the merits of the questions of law which had arisen in the lower Court. The situation in the case being one in which time was particularly vital.

On the 13th or 14th of March, 1916, two days before the appeal came on to be heard in this Court, the Judge of the lower Court made an order, directing the receivers to cause their counsel, to appear in this Court on the appeal and protect the jurisdiction of the lower Court. Pursuant to this order, and unquestionably as intended and instructed by the Judge of the lower Court, counsel for the receivers appeared

in this Court, and objected to a consideration of the appeal on its merits, the objection being based on the fact that no citation had been served upon the receivers, and that service of citation had not been waived by them. These objections were not made until the 16th of March, 1916.

The situation in which the controversy found itself was substantially as follows: The Judge of the lower Court had conceived the theory that there was vested in him power to control the Trustee in the exercise of the powers and functions vested in the Trustee; that by virtue of the initiation of the proceeding to foreclose, the powers of the Trustee had devolved upon the Court, and the Judge of the Court believed that he could exercise these powers as he saw fit without regard to the wishes of the bondholders, or of the Trustee. This right he asserted in certain orders made on the 21st of February, 1916. The Trustee contested this right, and in the contest that thus arose between the Judge and the Trustee, the Judge was in fact and in law an adverse party, and the Judge proceeded to use his power over his receivers, to obstruct a speedy determination of the questions of law, a matter of vital interest to the bondholders.

The fact that the Judge intended so to act did not become apparent, at least no tangible evidence of that fact existed, until on and after the 16th of March, 1916. This was ten days after the commencement of

the term—not ten days before the commencement of the term.

Indeed, the situation was not made absolutely clear until the hearing took place before this Court, viz: On the 16th day of March, 1916.

Mr. Rhoades did not arrive in San Francisco, and no officer of the Equitable Trust Company was in San Francisco, until the day after the conclusion of the hearing before this Court. He made his investigation, and the affidavit sets forth the facts which he then discovered. He returned to New York promptly; laid these facts before the Executive Committee of the Equitable Trust Company at a meeting of that Committee, held on the 29th of March, 1916; immediately transmitted his affidavit to the San Francisco counsel for the Equitable Trust Company, and the affidavit did not reach San Francisco until Sunday, April 2, 1916, and was filed Monday morning, April 3, 1916.

It is true the affidavit sets forth other matters than those herein recited, as a basis for the belief in the existence of prejudice, but the matters which had theretofore transpired, and which are recited in the earlier portions of the affidavit, were not of themselves matters from which any sure deduction of bias or prejudice necessarily flowed. The absence of any contest in the proceeding, coupled with the more or less equivocal nature of the matters then known, made it proper to refrain from the filing of any affidavit

under Section 21, until after the 16th of March, 1916, at which time the sum total of all the facts led the petitioner to believe that its duty required it to file such an affidavit. The affidavit therefore could not, in the nature of things, have been filed prior to the commencement of the term. Surely the delay which took place between the 20th of March, 1916, and the 3rd of April, 1916, was not, under the facts disclosed, sufficient to constitute laches, nor would such laches constitute cause entitling the lower Court to refuse to receive the affidavit.

From the 20th of March, 1916, until the 29th of March, 1916, the merits of the controversy between the Judge of the lower Court and the Trustee were under the consideration of this Court. The Judge of the lower Court had declared that he would not proceed with the cause in the lower Court until this controversy was determined, and it was obviously proper not to file an affidavit of this character pending the hearing of this controversy on appeal. Also, it was obviously proper for Mr. Rhoades to consult the Executive Committee of the Trust Company, and lay the matter before them, and indeed, the duty to take this course devolved upon him when the Judge of the lower Court declared that he would delay proceedings in the cause until after the decision of this Court had been handed down. In view of the fact that the Judge of the lower Court had declared that he would take no proceedings in the cause until this

Court had acted, and in view of the pendency of the proceedings before this Court, we do not believe that counsel for the Equitable Trust Company should have permitted the affidavit to be filed until after the decision of this Court.

We respectfully submit, therefore, that the affidavit showed good cause why the same was not filed prior to the commencement of the term, and that the decision of the lower Court to the contrary is a palpable abuse of discretion. However, the lower Court seems to have based its decision of that question, upon its conclusion upon other matters, concerning which it had no right to form a conclusion, and the decision on the matter involved should not have been influenced by the consideration of other matters admittedly considered.

In the opinion of the lower Court the Court first proceeds to declare and find that the facts and reasons stated are totally insufficient as a foundation for the belief that bias and prejudice exists, and continues:

"I will go farther than that and say that if I felt the least sense of my inability to pass upon the rights of every party involved in this controversy and give them the due meed of justice to which they are entitled, I would ignore every consideration of technical sufficiency and would certify this affidavit to the Senior Circuit Judge with the request that some one else have the burden cast upon them of carrying out what is left before this Court of the controversy in question. But I cannot conscientiously say that I have the least question of my ability to do equal and fair and unbiased justice between those parties. Hav-

ing that feeling, it is my duty to refuse to make such a certificate, and therefore I shall refuse it."

And the Court further said:

"But, summing up the whole affidavit in its entirety, I am quite satisfied, as I have said, that it wholly fails to make a case under the statute which would tend to show the existence in the mind of this Court of a state of personal bias or prejudice against any party connected with this case. I do not care whether technically the Equitable Trust Company is really a party to the controversy still remaining here, or not. It is argued that it is not; but it is a formal party, and I am not prepared to say that legally it did not have a right to interpose an affidavit of this kind. I care nothing about those things. I am looking only at the merits of the matter."

Obviously the refusal of the Court to certify the affidavit was not based upon a sound and legitimate exercise of its discretion concerning the question of whether the affidavit had been filed in time, for the opinion substantially declares that the Court would not have decided as it did decide had that question, and that alone, been submitted to it.

See

Harwood v. Quimby et al., 44 Iowa, 385.

The Equitable Trust Company is a party to the cause, and entitled to file the affidavit.

Counsel for the respondent claims that the Equitable Trust Company is not entitled to raise the question of bias and prejudice, for the reason that the

Equitable Trust Company is not an interested party, that is, not interested in the question of what up-set price should be fixed.

The Equitable Trust Company is, of course, a party to the cause, and is interested in the proper and speedy determination of the cause, and is interested in seeing a proper up-set price fixed. It is also interested in whether an intervention shall be allowed. It is also interested in all incidental questions, such as counsel fees, its own fees, fees for the receivers, etc. It is a highly interested party in the cause, and the mere fact that its position as Trustee may require that it stand impartially in controversies arising between the bondholders concerning what up-set price shall be fixed, is a matter of no importance. As Trustee it owes to every bondholder the obligation of pursuing the cause before an impartial tribunal. The proper performance of its duties as Trustee require it to see that the tribunal before which all questions are decided be impartial as between the parties. If the Equitable Trust Company permitted any question to be determined by a tribunal which it believed not to be impartial, even though that question were one arising between the bondholders and itself, it would be guilty of a breach of trust. The statute merely requires that the affidavit be filed by the party, and the fact that the party acts or appears in a

representative capacity does not destroy its right to file the affidavit.

Carroll v. District Court, 141 Pac., 312.

We respectfully submit that the remedy by mandamus is essential to the preservation of the rights granted by Section 21. If the application here presented be denied the broad benefit intended to be conferred by that section will be restricted and confined within very narrow and technical boundaries.

Respectfully submitted.

Attorneys for Equitable Trust Company
of New York.

Amici Curiae.

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

IN THE MATTER OF THE AP-
PEAL OF THE EQUITABLE
TRUST COMPANY FROM
THE ORDER ISSUING THE
INJUNCTION, DATED FEB-
RUARY 21, 1916.

**The Motion to Dismiss the Appeal for Failure
to Serve Citation has been Waived.**

COPY OF BRIEF FILED IN THE LOWER COURT
DEALING WITH THE MERITS OF THE CON-
TROVERSY PRESENTED ON APPEAL.

MURRAY, PRENTICE & HOWLAND,
JARED HOW,
W. E. S. GRISWOLD,
Attorneys for Equitable Trust Company
of New York.

F. W. M. CUTCHEON,
JOHN F. BOWIE,
Amici Curiae.

Filed this.....day of March, 1916.

F. D. MONCKTON, Clerk.

By....., Deputy.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

IN THE MATTER OF THE AP-
PEAL OF THE EQUITABLE
TRUST COMPANY FROM
THE ORDER ISSUING THE
INJUNCTION, DATED FEB-
RUARY 21, 1916.

THE MOTION OF THE RECEIVERS TO DISMISS THE
APPEAL FOR FAILURE TO SERVE CITATION
HAS BEEN WAIVED.

On the hearing of the appeal in the above entitled cause, the Receivers appeared and moved to dismiss the appeal on two grounds:

(1) On the ground that the citation had not been issued and served upon them;

(2) On the ground that the order appealed from was not an appealable order.

Since these motions have been made the Receivers

have filed their brief dealing with the appeal on the merits, as well as a brief dealing with the motion to dismiss.

The action of the Receivers in moving to dismiss the appeal on the ground that the order was not an appealable order, constitutes a waiver of the motion to dismiss on the ground that citation was not issued and served. This was expressly decided in the case of *Andrews v. National Foundry*, 77 Fed., 774, in which case the Court of Appeals for the Seventh Circuit said:

“They waived citation by joining in the motion at our last term to dismiss the appeal because the decree below was not final.”

At the hearing of the cause, Mr. McEnerney stated that he refrained from arguing the case on the merits because that would constitute a waiver of the motion to dismiss for failure to serve citation. Since the appeal has been argued, however, counsel have filed a brief upon the merits. This itself operates as a waiver of the motion to dismiss.

Richardson v. Green, 130 U. S., 104;

Renaud v. Abbott, 116 U. S., 227.

In *Richardson v. Green* the Court said:

“The issuing of a citation may be waived by the

appellee, and a general appearance by him is a waiver of a citation."

The brief filed is entitled "Brief on Appeal," and unquestionably constitutes a general appearance, dealing with the subject, as it does, upon the merits, and incorporating the brief on the merits filed in the lower Court.

It may be stated that counsel for the Receivers appeared in this Court pursuant to an order of the Judge of the lower Court, which order is in the following language:

"It appearing that The Equitable Trust Company of New York, plaintiff in the above entitled cause, has taken an appeal from an order enjoining said The Equitable Trust Company from further proceeding with a certain ancillary and dependent action in the Southern District of New York;

And it appearing that the Receivers heretofore appointed in this cause have not been made parties to said appeal;

It is ordered that the said Receivers be, and they are hereby authorized and directed to take any steps they may deem necessary to protect the jurisdiction of this Court upon the said appeal.

March 13th, 1916.

WM. C. VAN FLEET,
United States District Judge."

We file herewith copies of the brief of Mr. How, filed in the lower Court, dealing exclusively with the

interpretation of Contract B, and the merits of the appeal.

Respectfully submitted,

MURRAY, PRENTICE & HOWLAND,
JARED HOW,

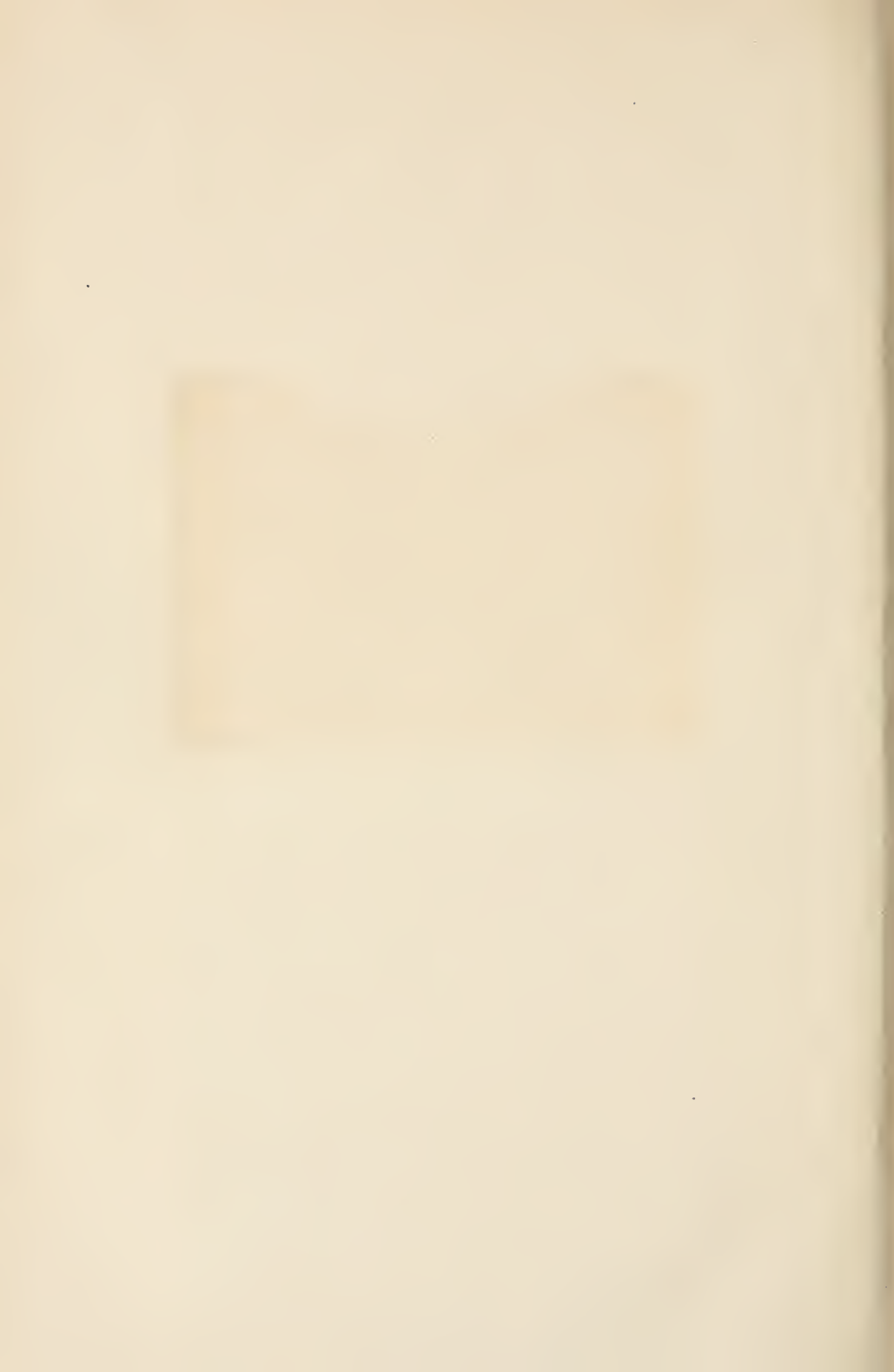
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Amici Curiae.



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